TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 35

UNITED STATES OF AMERICA, PETITIONER

vs.

E. P. SOUTH, DAN TARVEY, INC., ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

PETITION FOR CERTIORARI FILED JUNE 24, 1954

CERTIORARI GRANTED JULY 12, 1954

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. —

UNITED STATES OF AMERICA, PETITIONER,

vs.

R. P. SCOVIL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

INDEX

1-2 The State of South Carolina in the Supreme Court

Appeal from Greenville County

G. Badger Baker, Judge

UNITED STATES OF AMERICA, APPELLANT-CLAIMANT,

vs.

R. P. SCOVIL, RESPONDENT-CLAIMANT

In Re: ROY BASS MOTOR CO., PLAINTIFF, *vs.* DAN TASSEY, INC., DEFENDANT

TRANSCRIPT OF RECORD

JOHN C. WILLIAMS,
Attorney for Appellant,
Greenville, S. C.

LEATHERWOOD, WALKER, TODD, & MANN,
Attorneys for Respondent,
Greenville, S. C.

3 STATEMENT OF CASE

As the result of an action filed in the Court of Common Pleas in the County of Greenville, State of South Carolina, by the Roy Bass Motor Company, Greenville, South Carolina, a receiver was appointed by the Court on April 8, 1952, to take charge of the business operated by the defendant and all of its assets. The receiver took charge of said assets as of the day of his appointment and retained possession of the premises in which said business was operated until May 15, 1952.

In due time various creditors filed claims with the receiver, one of said creditors being Roger P. Scovil, owner of the premises occupied by the insolvent corporation. The insolvent corporation was in possession of the premises under a written lease with the Landlord, Roger P. Scovil, said lease being dated October 12, 1949, and being for the full term five years thereafter and under the terms of said lease, the Lessee was to pay rental on the basis of $250.00 per month, payable in advance on the first day of each successive month. The rent for the months of February, March and April, 1952, being in arrears and unpaid, the Landlord, on the 7th day of April, 1952, distressed upon all assets of said corporation for the rent then in arrears and, upon filing his claim, the Landlord took the position that said claim constituted a prior lien on the assets of the insolvent corporation by reason of the distress levied against the assets of said corporation for the past rent due.

The United States of America, Appellant herein, likewise filed a claim with the receiver, which claim consisted of the following tax items:

(1) Income tax due by the insolvent corporation in the amount of $449.96, the assessment list therefor being received by the Collector of Internal Revenue, December 14, 1950, and filed in the R. M. C. Office for Greenville County on April 2, 1951.

4 (2) Payroll taxes in the amount of $2,895.33, assessment list being received by the Collector on March 19, 1951, May 24, 1951, August 29, 1951, December 3, 1951, February 23, 1952 and February 28, 1952, all of which were filed in the R. M. C. Office for Greenville County on April 10, 1952. Included in the claim for payroll taxes is an item of $653.77 in connection with which the date of receipt of assessment list by the collector was unavailable.

The Master before whom claims were to be proven, filed a report sustaining the claim of the Landlord as a prior lien, to which report the United States of America filed exceptions. Said exceptions were heard by the Honorable G. Badger Baker, Presiding Judge, Thirteenth Judicial Circuit, who on January 15, 1953, filed an order holding that the claim of the Landlord had priority over the taxes due the United States of America with the exception of the item of income taxes in the amount of $441.96 referred to as item (1) above.

The sole question raised by this appeal is as to priority between the landlord's lien for rent and the lien of the United States of America for taxes due by the insolvent Corporation.

Master's Report

The above entitled action was heretofore referred to me for the purpose of determining the priority of various claims against the defendant.

According to the testimony and stipulation entered into by the interested parties, one R. P. Scovil is the owner of the building heretofore occupied by Dan Tassey, Inc. The corporation was occupying said property under a written lease providing for a rental of Two Hundred and Fifty and No/100 ($250.00) Dollars per month. The monthly installments of rent being payable in advance on the first of each month. The rent for the months of February, March and April, 1952 being in arrears and unpaid, the landlord pro-

5 ceeded on the 7th day of April, 1952 to distress upon the assets of said corporation for said rent in arrears. On the following day, to-wit: April 8, 1952 a receiver for the defendant was appointed by order of this Court. The receiver took charge of the premises on April 8, 1952 and retained assession of the same until May 15, 1952. Consequently, the landlord filed with the receiver a claim for Seven Hundred and Fifty and no/100 ($750.00) Dollars as rent for the

months of February, March and April, 1952 taking the position that said claim constitutes a prior lien on the assets of the corporation, junior to the cost of administration. The landlord likewise filed a claim for One Hundred, Twenty-Five and no/100 ($125.00) Dollars as rent from May 1st to May 15, 1952 taking position that this claim constituted a part of the cost of administration.

The landlord likewise made claim in the sum of Two Hundred and no/100 ($200.00) Dollars for expenses in cleaning and removing from said premises the debris, rubbish, etc. left upon the premises when the same were vacated by the receiver, however, the landlord has since reduced this claim to One hundred and no/100 ($100.00) Dollars, likewise the sum of Twenty-Six and no/100 ($26.00) Dollars for expenses in closing an opening in the roof occasioned by the receiver removing certain assets which had been attached to and projected through the roof. Likewise, a claim in the amount of Twenty-One and no/100 ($21.00) Dollars representing expenses incurred in closing an opening in one of the walls in said building occasioned by the receiver removing from said wall certain fixtures attached to and projecting into said wall; likewise, the landlord made further claim in the amount of Forty and no/100 ($40.00) Dollars for a laboratory which he had originally installed in said building and which is now missing. However, the receiver pointed out that the laboratory was absent from the premises when he took charge, therefore, the landlord abandoned this claim.

6 Likewise, according to the stipulation entered into, it develops that the corporation in question owed certain taxes to the United States Government; likewise said State and County taxes and also taxes to the City of Greenville, and as stated above, a hearing was had for the purpose of determining the priority of these various claims.

Written arguments have been submitted in behalf of the landlord and in behalf of the United States Government in support of their respective positions that their claims constitute a prior claim as to the assets of said corporation. It appears that assets are insufficient to pay the claim of the landlord and the claim of the United States, and for that reason, it is necessary to determine which claim has priority over the other. The total amount of taxes due the United States is $3,991.06 Dollars and consists of the following items; Four Hundred, Forty-One and 96/100 ($441.96) Dollars evidenced by a tax lien filed in the R. M. C. Office for Greenville County, South Carolina on April 2, 1951 representing withholding income taxes for the third quarter of 1950 in the amount of Three Hundred, Sixty-Five and 90/100 ($365.90) Dollars. The assessment list for which was received by the Collector of Internal Revenue on December 14, 1950. Seventy-Six and 06/100 ($76.06) Dollars of said amount representing Federal Insurance Contribution

for the fourth quarter of 1950, the assessment list for which was received on December 14, 1950. Also the amount of Two Thousand, Eight Hundred, Ninety-Five and 33/100 ($2,895.33) Dollars evidenced by tax lien filed in the R. M. C. Office for Greenville County on April 10, 1952 of which amount Four Hundred, Sixty-One and 01/100 ($461.01) Dollars is payroll taxes for the fourth quarter of 1950, the assessment list for which was received by the collector on March 19, 1951; Five Hundred, Forty-Nine and 06/100 ($549.06) Dollars is payroll taxes for the first quarter of 1951, the assessment list for which was received by the collector on May 24, 1951; Five
7 Hundred, Ninety-One and 69/100 ($591.69) Dollars is payroll taxes for the second quarter of 1951, the assessment list for which was received by the collector on October 29, 1951; Five Hundred, Ninety-Two and 03/100 ($592.03) Dollars is payroll taxes for the third quarter of 1951, the assessment list for which was received on December 3, 1951; Six Hundred, Twenty-Eight and 61/100 ($628.61) Dollars is payroll taxes for the fourth quarter of 1951, the easement list for which was received on February 28, 1952 and Seventy-Two and 93/100 ($72.93) Dollars represents Federal Unemployment Tax for the year 1951, the assessment list for which was received by the collector on February 23, 1952. Also an amount of Six Hundred, Fifty-Three and 77/100 ($653.77) Dollars representing payroll taxes for the first quarter of 1952. The record does not reveal the date the collector received the easement list for this item.

The government contends that its claim for taxes is a superior claim to that of the landlord for rent because of 31 U. S. C. A. 191 which states, "the debts due to the United States shall be first satisfied" whenever that person becomes insolvent; and because of 26 U. S. C. A. 3670, 71 and 72 which creates a lien on the property of the taxpayer for unpaid taxes.

It must be here pointed out that prior to the receivership the landlord had caused to be issued a distress warrant for his past due rent and that his landlord's lien as provided by statute, was fully perfected.

With regard to the first contention (31 U. S. C. A. 191), the Supreme Court of the United States held in *United States vs. Waddill, Holland and Flinn*, 323 U. S. 353, 65 S. Ct. 304, that where the landlord's lien for rent had not been perfected and made specific by distress prior to the insolvency, the claim of the United States was prior to that of the landlord. The Court was, however, careful to point out that it was not deciding the question as to which claim would be prior had the landlord perfected his claim prior to the

assignment for the benefit of the creditors there a receiver-
8 ship). The implication from that case is clear that, had the landlord's lien been specific and perfected, the result would have been different.

This section creates a priority in favor of the United States but the time such priority attaches is upon the appointment of the receiver. *People of Illinois ex rel Gordon vs. Campbell*, 67 S. Ct. 340, 329 U.S. 362. And when the receiver was appointed in this case, the insolvents' property upon which landlord had levied, was subject to a perfected and specific lien. The government could have no greater rights in this property than did the insolvent, *United States vs. Yates*, (Texas, 1947) 204 S.W. (2d) 399, and so far as the insolvent was concerned, it was subject to a perfected and specific lien.

On the second point that 26 U.S.C.A. 3670-71-72 creates a lien on the taxpayer's property, the government cites *United States vs. City of Greenville*, 118 F. (2d) 963 but overlooks what the Court of Appeals said on page 966. There Chief Judge Parker said:

> "Whether the lien provided by statute is entitled to priority over antecedent liens for taxes *duly perfected* by states or municipalities, is a question which is not before us and which we need not decide. It would seem, however, that the lien was intended to attach to the property subject to existing encumbrances; and this is borne out by the provision that it shall not be valid as against mortgagees, purchasers or judgment creditors until notice thereof is duly filed as provided by the Act."

The case of *Regan vs. Metropolitan Haulage Co., Inc.* 127 N.J. Eq. 487, 14 A (2d) 257, in which the government presented a claim to the receiver similar to the one in this case, is an interesting and pertinent authority. Under the New Jersey statute, a garageman is given a lien on the specific property repaired. No further action on his part is required.

9 There the Court said:

> "(5) The government's contention that under Section 3186 (a) of the Revised Statutes, 26 U.S.C.A. Int. Rev. Code, 3670, 3671, its claim is a lien on all property and rights of a debtor, as soon as the assessment list is received by the collector and continues until the liability is satisfied, is correct; but such lien is a general lien upon the estate of the insolvent bankrupt. It does not attach to any specific property covered by a valid specific lien until after the specific lien is first satisfied.
>
> See Ferris vs. Chic-Mint Gum Co., 14 Del. Ch. 232, 124 A. 577; in re Wyley, D. C. 292 F. 900; Sherwood vs. United

States, D. C., 5 F. 2d 991; In re Caswell Construction Co., D. C. 13 F. 2d 667."

And so here the government's general lien given by 26 U.S.C.A. 3670 when the assessment lists are received by the collector does not attach to the property upon which the landlord levied his distress until that specific lien is first satisfied.

In *Crawford Co., Inc. vs. L. Leopold and Co.*, 70 N. Y. S. (2d) 183, the question for determination was whether a mechanic's lien filed on November 21, 1944 took precedence over a tax lien created by the receipt of the assessment list in the office of the collector on November 2, 1944. The tax lien was not recorded in any of the places required by 26 U.S.C.A. 3672.

The Court held that the holder of the filed mechanic's lien was a "purchaser" within the meaning of Section 3672 and that as such he was protected until the lien of the government was recorded. This decision was affirmed by the Court of Appeals for New York in 297 N. Y. 884, 79 N. E. (2d) 279.

In *National Refining Co. vs. United States*, 160 F. (2d) 951, (8th Cir.) a "purchaser" under Section 3672 was defined as one who, for a valuable present consideration, acquires property or an interest in property. Surely, the landlord who gives consideration in the form of the use of the premises, and who acquires an interest in the specific property by perfecting his lien by way of distress fits this definition.

There is another theory of this case which is applicable. 26 U.S.C.A. 3672 states that a tax lien is not valid as against a mortgage until recorded in the Office of the R. M. C. Under the South Carolina law, the lien of a landlord for past due rent is superior to that of a mortgagee except in two instances, i.e., where the mortgage was executed before the rental contract was entered into, or (2) when it was executed before the chattels were brought upon the rented premises, *Maynard vs. Bank of Kershaw*, 188 S. C. 160, 198 S. E. 188.

The mortgage takes precedence over the federal tax lien until recorded as required by Section 3672; the landlord's lien takes precedence over the mortgage. It necessarily follows that the landlord's lien takes precedence over the federal tax lien.

The same situation was present in *Ferris vs. Chic-Mint Gum Co.*, 14 Del. Ch. 232, 124 A. 577, where the Court said at page 580:

> "Here we have three claimants, each claiming certain preferences. The first (the state, county, and city) admittedly outranks the second (the mortgagee) and we have seen that the second outranks the third (the United States). Yet it is contended that the third is to be preferred to the first and thus displace the second from a position of preference over the third

If this contention be accepted then indeed will the last be declared to be first. When the government agreed by section 3186 to take rank after the mortgagee, it must necessarily follow that it is subordinate in rank to those who are superior to its immediate senior."

To the same effect is *Louisiana State University vs. Hart*, 210 La. 78, 26 So. (2d) 361, 174 A.L.R. 1366 where the Court said:

"It is undisputed that Section 3670 of the Internal Revenue Code creates a tax lien but does not give it priority. It is also undisputed that the general lien created by that statute is inferior to prior mortgages or equitable or legal liens and encumbrances. It would seem to be anomalous, therefore, to say that if a mortgage intervened between the date the attachment was obtained by the Louisiana State University and the date the tax lien of the United States arose, the privilege or lien of the University would be superior to the mortgage, which, in turn, would be superior to the tax lien of the United States, but that the tax lien of the United Sates would be superior to the privilege of the University. That, however, is the situation that would result if the argument on behalf of the United States is followed to its logical conclusion. We do not think the law sanctions such an anomalous situation."

It would indeed be an unlikely situation to hold that the landlord's lien was superior to a mortgage (and this we must hold under the South Carolina law); to hold that a mortgage was superior to the Federal tax lien not recorded (and this we must hold under 26 U.S.C.A. 3672); and that the federal tax lien was superior to the perfected landlord's lien. The Court will not countenance such a result and as was said in the above cited cases when the government by statute placed a mortgage above its unrecorded tax lien, it necessarily placed above its tax lien any other lien which would take precedence over the mortgage.

For the reasons above stated, I am of the opinion that the lien in the amount of Seven Hundred and Fifty and no/100 ($750.00) Dollars representing unpaid rent for the months February, March and April, 1952 constitutes a lien on the assets of said corporation superior to the government's tax lien; I am also of the opinion that the landlord's claims in the amount of One Hundred and no/100 ($100.00), Twenty-Six and no/100 ($26.00) and Twenty-One and no/100 ($21.00) Dollars respectively constitutes items properly chargeable to the cost of administration along with the landlord's claim in the amount of One Hundred, Twenty-Five and no/100 ($125.00) Dollars representing rent for the period May 1, 1952 to May 15, 1952.

12 I therefore respectfully recommend that the receiver, after first paying the cost of the administration including the landlord's claims in the amounts of One Hundred Dollars ($100.00), Twenty-Six Dollars ($26.00), Twenty-One Dollars ($21.00) and One Hundred, Twenty-Five Dollars ($125.00) respectively, pay the landlord's claim in the amount of Seven Hundred, Fifty and no/100 ($750.00) representing rent for the months February, March and April, 1952 and the balance of the proceeds in his hands realized from the sale of the assets of the defendant corporation, to the United States for application to its tax lien.

Respectfully submitted,

E. INMAN,
Master.

September 8th, 1952.

ORDER OF JUDGE BAKER

This proceeding comes before me upon appeal from the Report of the Master of Greenville County dated September 8, 1952, establishing the priority of certain claims filed with the Receiver for the insolvent defendant Dan Tassey, Inc. The receiver was appointed on April 8, 1952, and the following claims were filed with him, but not in the order of their priority as I enumerate them:

(a) Claim for rent in the amount of $750.00, for which distress was levied on April 7, 1952, by Robert P. Scovil.

(b) Claim for $100.00 for cleaning premises vacated by Receiver; $26.00, enclosing opening in roof during removal of assets by Receiver; $21.00, enclosing opening in wall during removal of assets by Receiver; and $125.00 for rent during occupancy of Receiver.

(c) Claim for property taxes assessed January 1, 1951, for County of Greenville in the amount of $146.66.

13 (d) Claim for property taxes assessed January 1, 1951, for City of Greenville in the amount of $136.26.

(e) Claim by South Carolina Employment Security Commission for employment compensation contribution taxes in the sum of $600.56.

(f) The following claims of the United States: income tax of $441.96, the assessment list being received by Collector of Internal Revenue on December 14, 1950, filed in the office of the R. M. C. for Greenville County April 2, 1951; claim for payroll taxes in the sum of $2,895.33, assessment lists being received by the Collector on March 19, 1951, May 24, 1951, August 29, 1951, December 3, 1951, February 28, 1952, and February 23, 1952; all of which were filed in the office of the R. M. C. for Greenville County on April 10, 1952. The foregoing claim for payroll taxes includes $653.77, on

which the date of receipt of assessment list by the Collector was unavailable.

The Master recommends there should be first paid the costs of administration, which he holds are included in item (b); next, the claim of the landlord for the rent as contained in item (a); and third in order of priority, the claim of the United States Government. He does not make any recommendation for the payment of City and County taxes, or other order of priority.

After study of the record, it is my conclusion the order of priority of claims should be as follows:

(1) The costs of administration which are contained in item (b) of this order. This, of course, should also include Receiver's fees and expenses.

(2) Claim by the United States Government for income taxes in the sum of $441.96, received by the Collector of Internal Revenue on December 14, 1950, and filed in the office of the R. M. C. on April 2, 1951.

(3) Taxes due the city and County of Greenville in the amounts of $136.26 and $146.66, as contained in items (c) and (d).

14 (4) Rent in the amount of $750.00, as set forth in item (a).

(5) The balance is to be applied to the payment of the remainder of the claims filed by the United States Government.

Having given what should be the order of priority, I will now undertake to give my reasons therefor.

The United States Government contends its claim for taxes is superior to the claim of the landlord for rent by reasons of Sections 3670 and 3671, Title 26, USCA. Section 3670 provides, "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any cost, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." Section 3671 specifies the lien shall attach as of the date the assessment list is received by the Collector. There will be found, however, in Section 3672, Title 26, USCA, certain exceptions to the vesting of the lien in favor of the United States, which is "such lien shall not be valid as against any mortgagee, pledgee, purchaser or judgment creditor until notice thereof has been filed by the Collector in accordance with the law of the State or Territory in which the property subject to the lien is situated * * *" For the purpose of authorizing the filing of notices of lien in accordance with the provisions of Section 3186 of the Revised Statutes of the United States, acts or parts of acts amendatory thereto, the General Assembly of this State passed what is known as the Uniform Federal Tax Lien Registration Act, and

is contained in Vol. 6, Sections 65-2721, 2[illegible] of our 1952 Code of Laws. The income tax lien for $441.96 which was received by the Collector on December 14, 1950, and filed in the office of the R. M. C. for Greenville County on April 2, 1951, has priority over the rent claim or lien. The landlord's lien for rent was per-
15 fected by distress proceedings on April 7, 1952. The Receiver was appointed on April 8, 1952, but the claim for the income taxes was filed on April 2, 1951, which, of course, was prior to the date of the distress and appointment of the Receiver. This item, therefore, clearly takes priority over the rent lien. The remaining items comprising the Government's claim were not filed in the office of the R. M. C. until April 10, 1952, although most of them were received by the Collector in 1951. The Master has found that the perfected lien of the landlord comes within the meaning of "purchaser" as provided in Section 3672, *supra*.

It is needless for me to reiterate the Master's reasons for arriving at this conclusion since I am in accord with him, and for the reasons stated in his order I have made the remaining items of the Government's claim secondary in priority to the lien of the landlord. The taxes for the County and City of Greenville have received priority to the Government items, excepting the income tax lien of $441.96, and the claim for rent. These taxes were assessed January 1, 1951. Section 65-2701 of the Code of Laws of 1952, provides all taxes, assessments and penalties legally assessed shall be a first lien in all cases whatsoever upon the property taxed, the lien to attach at the beginning of the fiscal year during which the tax is levied.

Section 65-2702 says the tax assessment shall immediately become a first lien on the property as soon as it is listed with the auditor of any county in this state for taxation. The city and county taxes became a first lien on January 1, 1951, subject to the prior lien of the United States Government for the income taxes in division (2) of order of priority, since this claim was received by the Collector on December 14, 1950. The remaining Government items for taxes were not received by the Collector until after January, 1951, consequently, they are inferior to the priority of taxes due the City and County of Greenville. The rent lien is made secondary to the taxes due the City and County of Greenville by reason of Section 41-162, Vol. 4, Code of Laws of 1952, which
16 is entitled, Taxes Lien on Property Sold Under Distress, and the body of which Act is as follows: "The purchaser at a sale of chattels seized under a distress warrant shall take the property subject to any lien for taxes thereon."

The lien of the South Carolina Employment Security Commission has not been overlooked, but it is last in priority and it is apparent there will not be sufficient funds for even the partial satis-

faction of this claim. As against claims of the character involved, this particular type of tax requires perfection through execution and levy, which was not done.

Except as herein modified and added to, the Master's Report is confirmed.

G. Badger Baker,
Judge, Twelfth Judicial Circuit.

At Chambers,
Florence, S. C.
January 15, 1953.

17 *Exceptions*

I. It is respectfully submitted that the Circuit Judge erred in finding and holding that the taxes due the United States of America do not have priority over the rent claim of the landlord, the error being that:

(a) The United States has priority under Sections 3670 and 3671, Title 26, U. S. C. A.
(b) The United States has priority under Title 41, Section 161, Volume 4, 1952 Code of Laws of South Carolina.

II. It is respectfully submitted that the Circuit Judge erred in not finding that the taxes due the United States of America have priority in Receivers'ip of the debtor, the error being that under Sections 191 and 192, Title 31, U. S. C. A., the United States has priority over all other creditors of the debtor.

Agreement

We agree that the foregoing when printed and filed in the Supreme Court shall constitute the record on which this appeal shall be based.

John C. Williams,
Attorney for Appellant-Claimant
Leatherwood, Walker, Todd & Mann
Attorneys for Respondent-Claimant

18 I, J. B. Westbrook, Clerk of The Supreme Court of South Carolina, do hereby certify that the foregoing 17 pages is a true and correct copy of The Transcript of Record in the case of United States of America, applt-claimant, vs. R. P. Scovil, respt-claimant.

J. B. Westbrook,
[seal.] *Clerk.*

February 19, 1954.

19 The State of South Carolina

IN THE SUPREME COURT

UNITED STATES OF AMERICA, APPELLANT,

vs.

R. P. SCOVIL, RESPONDENT.

Appeal from Greenville County

G. BADGER BAKER, *Judge*

Case No. 3679

Opinion No. 16789

Filed October 26, 1953

AFFIRMED

John C. Williams, of Greenville, for appellant.
Leatherwood, Walker, Todd & Mann, of Greenville, for respondent.

TAYLOR, A. J.: As the result of an action filed in the Court of Common Pleas in the County of Greenville, State of South Carolina by the Roy Bass Motor Company, Greenville, South Carolina, a receiver was appointed by the Court on April 8, 1952, to take charge of the business operated by the Defendant and all of its assets. The receiver took charge of said assets as of the day of his appointment and retained possession of the premises in which said business was operated until May 15, 1952

In due time, various creditors filed claims with the receiver, one of said creditors being Roger P. Scovil, owner of the premises occupied by the insolvent corporation. The insolvent corporation was in possession of the premises under a written lease with the Landlord, Roger P. Scovil, said lease being dated October 12, 1949, and being for the full term, five years thereafter, and under the terms of said lease, the Lessee was to pay rental on the
20 basis of $250.00 per month, payable in advance on the first day of each successive month. The rent for the months of February, March and April, 1952, being in arrears and unpaid, the Landlord, on the 7th day of April, 1952, distressed upon all assets of said corporation for the rent then in arrears and, upon filing his claim, the Landlord took the position that said claim constituted a prior lien on the assets of the insolvent corporation by reason of the distress levied against the assets of said corporation for the past due rent.

The United States of America, Appellant herein, likewise filed a claim with the receiver which consisted of the following tax items:

(1) Income tax due by the insolvent corporation in the amount of $441.96, the assessment list therefor being received by the Collector of Internal Revenue, Dec. 14, 1950, and filed in the R. M. C. Office for Greenville County on April 2, 1951.

(2) Payroll taxes in the amount of $2,895.33, assessment list being received by the Collector on March 19, 1951, May 24, 1951, August 29, 1951, December 3, 1951, Feb. 23, 1952 and February 28, 1952, all of which were filed in the R. M. C. Office for Greenville County on April 10, 1952. Included in the claim for payroll taxes is an item of $653.77 in connection with which the date of receipt of assessment list by the collector was unavailable.

The Master before whom these claims were to be proven, filed his report sustaining the claim of the Landlord as a prior lien, to which report the United States of America filed exceptions. Said exceptions were heard by the Honorable G. Badger Baker, Presiding Judge, Thirteenth Judicial Circuit, who on January 15,
21 1953, filed an Order holding that the claim of the Landlord had priority over the taxes due the United States of America with the exception of the item of income taxes in the amount of $441.96 referred to as Item (1) above.

The sole question raised by this appeal is as to priority between the Landlord's lien for rent and the lien of the United States of America for taxes due by the insolvent corporation.

There is no question in this case of distress having been perfected prior to the appointment of the receiver; therefore, the lien was perfected as of that time and the amount specified in such distress was not available to the receiver to pay other debts of the insolvent debtor. 31 USCA 191 gives the U. S. Government claim no priority over this lien as the distress, hence the lien, was perfected April 7, 1952, before the appointment of the receiver on April 8, 1952. The Government could have no greater right in the property in the hands of the receiver than the insolvent. *United States* vs. *Yates*, 204 S. W. (2d) 399, (Texas 1947), *Karno-Smith Co.* vs. *Maloney, Collector of Internal Revenue*, 112 Fed. (2d) 690 (3rd Cir.), *Thelusson* vs. *Smith*, 2 Wheat. 396, 4 L. Ed. 271, *People of New York* vs. *United States*, 106 Fed. (2d) 210 (3rd Cir.), *In re. Holmes Mfg. Co.*, 19 Fed. (2d) 239 Dist. Ct. Conn.).

Section 26 USCA provides that such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector, which in this

case means the Register of Mesne Conveyances. Section 65-2722 of the South Carolina Code for 1952.

22 The Government's tax lien under this section is of force against a Landlord's lien which has been perfected only from the date of recording of such tax lien and, therefore, not effective in the case at bar.

We are of the opinion that all exceptions should be dismissed, the judgment appealed from affirmed and it is so ordered

BAKER, C. J., STUKES and OXNER, JJ., concur. FISHBURNE, J., not participating.

A true copy:

[SEAL] J. B. WESTBROOK, *Clerk* (s).

☆ U. S. GOVERNMENT PRINTING OFFICE 1954 290481 897

In the Supreme Court of the United States

No. ——, October Term, 1953

United States of America, petitioner

v.

R. P. Scovil (in re Roy Bass Motor Co. *v.* Dan Tassey, Inc.)

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner,
It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 25, 1954.

Earl Warren
Chief Justice of the Supreme Court of the United States.

Dated this 22d day of January, 1954.

Supreme Court of the United States

No. 643, October Term, 1953

UNITED STATES OF AMERICA, PETITIONER

v.

R. P. SCOVIL, DAN TASSEY, INC., ET AL.

Order allowing certiorari

Filed May 24, 1954

The petition herein for a writ of certiorari to the Supreme Court of the State of South Carolina is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

PETITION FOR WRIT of CERTIO-RARI

No. 35

In the Supreme Court of the United States

OCTOBER TERM, 1955

UNITED STATES OF AMERICA, PETITIONER

v.

R. P. SCOVIL, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE SU[illegible] OF THE STATE OF SOUTH CAROLINA

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OCTOBER TERM, 1953

No. 643

UNITED STATES OF AMERICA, PETITIONER

v.

R. P. SCOVIL, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of South Carolina in this case.

OPINIONS BELOW

The opinion of the Supreme Court of South Carolina (R. 12-14) is reported at 78 S.E. 2d 277. The order of the Court of Common Pleas (R. 8-11) is not reported.

JURISDICTION

The judgment of the Supreme Court of South Carolina (R. 12, 14) was entered October 26, 1953. On January 22, 1954, Mr. Chief Justice Warren

extended the time for filing a petition for a writ of certiorari to and including March 25, 1954. The jurisdiction of this Court is invoked under 28 U. S.C., Section 1257(3).

This suit (originating as a receivership proceeding (R. 1)) arises out of conflicting claims for priority of the tax claims of the United States and those of a landlord under a distress for unpaid rents, against the assets of an insolvent debtor in the hands of a receiver appointed by a state court. In the trial court (Court of Common Pleas, Greenville County, State of South Carolina) the United States asserted its right to priority in the payment of its debts under R.S. 3466, and also claimed that Section 3670-3672 of the Internal Revenue Code gave it a lien on property of the taxpayer which was paramount to the landlord's distress claims for rent. (R. 1-11.) The court (on exceptions filed by the United States to the Master's Report (R. 2)) held that the landlord's distress claim for rents was superior to the claim of the United States for its taxes and that the landlord was entitled to have his claim paid out of the assets in the hands of the receiver before the United States might participate (R. 8-11). On appeal to the Supreme Court of the State of South Carolina, the United States again asserted its claim to priority under R.S. 3466 and the superiority of its tax liens under Sections 3670-3672 of the Internal Revenue Code (R. 11). That court held that the distress claims of the landlord for rent were paramount to the Government's priority claims under R.S. 3466, 31 U.S.C. 191, and

lien of the United States under Sections 3670-3672 (R. 12-14).

The question is one of substance, as is more fully developed under the reasons for granting the writ.

QUESTIONS PRESENTED

1. Whether the priority accorded claims of the United States against the assets of an insolvent debtor by R. S. 3466 is defeated by a landlord's lien for rent arrears created by state law, where the landlord has not divested the debtor of possession of any property subject to the lien.

2. Whether the lien accorded the United States for unpaid taxes by Section 3670 of the Internal Revenue Code is rendered subordinate to a subsequently arising landlord's lien created by state law, merely because notice of the federal tax lien was filed after the landlord's lien arose.

STATUTES INVOLVED

The pertinent provisions of the federal and state statutes involved are printed in the Appendix, *infra*, pp. 13-16.

STATEMENT

This case involves the relative priority of tax claims of the United States and rent claims of a landlord against the estate of an insolvent corporation in receivership, Dan Tassey, Inc. (hereafter sometimes referred to as the taxpayer). The material facts, as disclosed by the statement of the case (R. 1-2), the master's report (R. 2-8), and the opinion below (R. 12-14), are not in dispute.

The claims of the United States are for taxes

assessed against the taxpayer for 1950 and 1951 in the aggregate amount of $3,549.10, the assessment lists for which were received by the Collector on various dates between March 19, 1951, and February 28, 1952.[1] Notice of federal tax lien covering these assessments was recorded in the Register of Mesne Conveyances for Greenville County, South Carolina, on April 10, 1952. (R. 3-4, 12-13.)

The business of the taxpayer corporation was conducted on premises occupied under a five-year lease from R. P. Scovil (herein sometimes referred to as the landlord) dated October 12, 1949, under the terms of which the lessee (taxpayer) was to pay rental at the rate of $250 per month, payable in advance on the first day of each month. The rents for the months of February, March, and April, 1952, being in arrears and unpaid, the landlord on April 7, 1952, caused a warrant of distress to be issued upon all the assets of the taxpayer corporation for the $750 rent then in arrears. On the next day, April 8, 1952, the South Carolina Court of Common Pleas appointed a receiver for the taxpayer and all of its assets. The receiver took possession of the assets the same day and operated the taxpayer's business until May 15, 1952. The United States and the landlord both filed claims against the receiver for the respective amounts owing to

[1] The tax claims filed with the receiver also included assessments for earlier periods aggregating $441.96, but these were given priority by the courts below (R. 10, 13), and are no longer involved. With respect to $653.77 of the amount still in issue, covering payroll taxes for the first quarter of 1952, the date of the receipt of the assessments list by the Collector does not appear. (R. 4.)

them. The assets of the taxpayer corporation were sold at public auction by the receiver, pursuant to court order, for an amount insufficient to satisfy all claims against it. (R. 2-3, 12-13.)

The master filed a report (R. 2-8) holding that the claim of the landlord for unpaid rent was prior and superior to the tax claims of the United States, and the United States filed exceptions (R. 2). The Court of Common Pleas affirmed the master's report (R. 8-12.) [2]

The United States appealed, the only questions presented on the appeal being whether the tax claims were entitled to priority over the landlord's claim, under either Section 3466 of the Revised Statutes of the United States or Sections 3670-3672 of the Internal Revenue Code. (R. 2, 13.) The Supreme Court of South Carolina affirmed the decision of the Court of Common Pleas. (R. 12-14.)

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding, contrary to Section 3466 of the Revised Statutes and the decisions of this Court, that the landlord's rent claim against the insolvent taxpayer was entitled to priority of payment over the tax claims of the United States.

2. In holding, contrary to Sections 3670, 3671, and 3672 of the Internal Revenue Code, and the decisions of this Court, that the landlord's lien for

[2] Except for the amount of $441.96 referred to in the preceding footnote, and no longer in issue.

unpaid rent was superior to the antecedent liens of the United States for unpaid taxes.

REASONS FOR GRANTING THE WRIT

The tax claim of the United States is entitled to priority of payment, over the rent claim of the landlord, out of the proceeds of the receiver's sale of the insolvent taxpayer's property, under both the federal priority statute (R. S. 3466 (Appendix, *infra*, p. 14)) and the federal lien statute (Internal Revenue Code, Sections 3670-3672 Appendix, *infra*, pp. 13-14). In holding that neither statute made the Government's claim paramount and that the landlord's claim was prior in right, the court below disregarded the controlling decisions of this Court applying the federal priority statute (*United States v. Gilbert Associates*, 345 U.S. 361; *United States v. Waddill Co.*, 323 U.S. 353; *Illinois v. Campbell*, 329 U.S. 362), as well as those applying the federal lien statute (*United States v. City of New Britain*, 347 U. S. 81; *United States v. Security Tr. & Sav. Bk.*, 340 U.S. 47). On the basis of the undisputed facts, and on the authority of this Court's recent decisions in the *Gilbert Associates* and *City of New Britain* cases, it is respectfully submitted that the writ of certiorari should be granted and the decision of the Court below reversed.

1. Section 3466 of the Revised Statutes prescribes that "Whenever any person indebted to the United States is insolvent, * * * the debts due to the United States shall be first satisfied." The pri-

ority accorded the United States in the collection of claims against an insolvent is by the terms of the statute absolute. In a long line of cases this Court has repeatedly held that an adverse lien which has not become both specific and perfected before the debtor becomes insolvent can not serve to deprive the United States of its priority right.[3] *United States* v. *Gilbert Associates, supra; Illinois* v. *Campbell, supra; United States* v. *Waddill Co., supra; United States* v. *Texas,* 314 U.S. 480; *New York* v. *Maclay,* 288 U.S. 290; *Spokane County* v. *United States,* 279 U.S. 80; *United States* v. *Oklahoma,* 261 U.S. 253; *Thelusson* v. *Smith,* 2 Wheat. 396; *Field* v. *United States,* 9 Pet. 182; *Conard* v. *Atlantic Insurance Co.,* 1 Pet. 386; cf. *United States* v. *Security Tr. & Sav. Bk., supra; Massachusetts* v. *United States,* 333 U.S. 611; *Illinois* v. *United States,* 328 U.S. 8. To be "specific," the adverse lien must, among other requirements, attach to particular items of the debtor's property. *Illinois* v. *Campbell, supra,* pp. 373, 375-376; *United States* v. *Waddill Co., supra,* p. 359; *United States* v. *Texas, supra,* p. 485. To be "per-

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[3] In several of the cases the Court has expressly posed but left unanswered the question of whether even a specific and perfected adverse lien can serve as an exception to the absolute priority accorded claims of the United States by the terms of R. S. 3466. *United States* v. *Texas, supra,* pp. 485-486; *New York* v. *Maclay, supra,* p. 294; *Spokane County* v. *United States, supra,* p. 95; *Michigan* v. *United States,* 317 U.S. 338, 341. "This Court has never actually held that there is such an exception." *United States* v. *Gilbert Associates, supra,* p. 365. In each instance, the Court has found it unnecessary to reach and decide the question, having concluded that the adverse lien was not sufficiently specific and perfected.

fected," the lien must be enforced at least to the point of divesting the debtor of either title or possession. *United States* v. *Gilbert Associates, supra,* pp. 365-366; *United States* v. *Security Tr. & Sav. Bk., supra,* p. 51; *Illinois* v. *Campbell, supra,* pp. 375-376; *United States* v. *Waddill Co., supra,* pp. 357-360. Whether an adverse lien has become sufficiently specific and perfected to overcome the federal priority presents, of course, a federal question. The priority established by Congress in favor of the United States may not be impaired by state legislation or state court decisions creating interests in the debtor's property in favor of third parties. *United States* v. *Gilbert Associates, supra; Illinois* v. *Campbell, supra,* p. 371; *United States* v. *Waddill Co., supra,* p. 357. See also *United States* v. *Security Tr. & Sav. Bk., supra,* p. 51; *United States* v. *City of New Britain, supra.*

In this case, the Supreme Court of South Carolina has held (R. 13-14) that a lien created by South Carolina law in favor of a landlord became specific and perfected a day before a receiver for the taxpayer-lessee's property was appointed merely by virtue of the issuance of a warrant of distress pursuant to the South Carolina law. Appendix, *infra,* pp. 14-16. But there is nothing in the record to indicate that the landlord had actually divested the taxpayer of the title or possession of any of its property prior to the appointment of the receiver. Recently, in the *Gilbert Associates* case, this Court held that a Town's tax lien was not sufficiently specific and perfected to defeat the federal priority notwithstanding that the Town (p. 362) had "sold"

the taxpayer's property at a tax sale before (and again after) the appointment of the receiver where no change in possession was accomplished. The Court said (p. 366) that "There is no ground for the contention here that the Town had perfected its lien by reducing the property to possession. The record reveals no such action." Similarly, the record here discloses nothing to show that the landlord had reduced the property to possession. See also *United States* v. *Waddill Co., supra,* pp. 357-360; *Illinois* v. *Campbell, supra,* pp. 375-376. Furthermore, even as a matter of state law the issuance of the distress warrant the day before the receiver was appointed did not operate to divest the taxpayer of possession of any of its property, since no possession could have been obtained until five days after distress.[4] Indeed, any suggestion that the landlord acquired possession would be incompatible with the conceded facts that the receiver took over all the taxpayer's assets and that the landlord's claim is being asserted against the proceeds of the receiver's sale.

Nor is there any basis for the assumption by the

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[4] The distress warrant was issued pursuant to Sections 41-151 and 41-153 of the South Carolina Code Annotated (1952 ed.) (Appendix, *infra*, pp. 14-15). Under Section 41-160 of the State Code (Appendix, *infra*, p. 16), the taxpayer had five days after distress was issued within which to free its property from the distress, during which time it could not be deprived of title or possession. Only after expiration of the five days and upon failure of the tenant to furnish the bond therein provided could the property be sold for the payment of rent due. See Section 41-161 of the South Carolina Code (Appendix, *infra*, p. 16). Furthermore, "The purchaser at a sale of chattels seized under a distress warrant shall take the property subject to any lien for taxes thereon." Section 41-162 of the South Carolina Code (Appendix, *infra*, p. 16).

court below that the landlord's lien was specific rather than general, in view of the fact (R. 1, 12) that the landlord had "distressed upon all the assets" of the insolvent taxpayer. "In claims of this type, 'specificity' requires that the lien be attached to certain property by reducing it to possession * * *. Until such possession, it remains a general lien." *United States* v. *Gilbert Associates, supra,* p. 366. And "Where the lien of the Town [here the landlord] and that of the Federal Government are both general, and the taxpayer is insolvent, § 3466 clearly awards priority to the United States." *Id.,* p. 366. See also *Illinois* v. *Campbell, supra,* p. 370, 375-376; *United States* v. *Waddill Co., supra,* p. 359; *United States* v. *Texas,* 314 U.S. 480, 488.

2. The tax claim of the United States is likewise paramount to the claim of the landlord under the federal lien statute. Sections 3670 and 3671 of the Internal Revenue Code accord the United States a lien for unpaid taxes upon all property belonging to the delinquent taxpayer, the lien arising when the assessment list is received by the Collector. Under this Court's recent decision in the *City of New Britain* case, in which it enunciated the principle of "the first in time is the first in right" for purposes of applying the federal lien statute, the United States must prevail unless the landlord acquired a choate lien before the federal liens attached. See also *United States* v. *Security Tr. & Sav. Bk., supra.* Here the federal tax liens antedated the landlord's lien. They arose and attached

to all of the taxpayer's property on various dates between March 19, 1951, and February 28, 1952, when the several assessment lists were received by the Collector, whereas the landlord's lien did not arise until the distress warrant was issued on April 7, 1952. (R. 2-4, 12-13.)

The court below nevertheless ruled (R. 13-14) the landlord's claim to be superior under Code Section 3672, which provides that the federal lien "shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector" in a designated recording office. It held (R. 14) that "under this section" the Government's tax lien was effective "only from the date of recording" of the lien (April 10, 1952), which was after the distress warrant was issued. This holding is patently erroneous, for the landlord does not come within any of the excepted categories enumerated in Section 3672; it was not a "mortgagee, pledgee, purchaser, or judgment creditor" within the purview of that section. Cf. *United States* v. *Gilbert Associates, supra; United States* v. *Security Tr. & Sav. Bk., supra.* And since the landlord's claim does not fall within any of the classes of interests which Section 3672 protects against an unrecorded federal tax lien, whether or when the federal lien was recorded is of no significance here. *United States* v. *Snyder,* 149 U.S. 210. This case is governed rather by the principle of "first in time is first in right" applied in *City of New Britain,* and under the decision in

that case the federal liens are clearly superior to a subsequently arising landlord's lien.

CONCLUSION

The decision below is manifestly erroneous. It is respectfully submitted that the petition for a writ of certiorari should be granted, and the decision below be reversed, without argument or further briefs, on the authority of *United States* v. *Gilbert Associates, supra,* and *United States* v. *City of New Britain, supra.*

SIMON E. SOBELOFF,
Solicitor General.

MARCH, 1954.

APPENDIX

Internal Revenue Code:

SEC. 3670. PROPERTY SUBJECT TO LIEN.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U.S.C. 1946 ed., Sec. 3670.)

SEC. 3671. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

(26 U.S.C. 1946 ed., Sec. 3671.)

SEC. 3672 [as amended by Sec. 401, Revenue Act of 1939, c. 247, 53 Stat. 862, and Sec. 505, Revenue Act of 1942, c. 619, 56 Stat. 798]. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*—Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

(1) *Under State or Territorial Laws.*—In the office in which the filing of such notice is

authorized by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law authorized the filing of such notice in an office within the State or Territory; or

* * * * *

(26 U.S.C. 1946 ed., Sec. 3672.)

Revised Statutes of the United States:

SEC. 3466. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

(31 U.S.C. 1946 ed., Sec. 191.)

South Carolina Code Annotated (1952 ed.):

Title 41. Landlord and Tenant. Chapter 4. Collection of Rent by Distraint.

SEC. 41-151. *Collection of rent by distress.*

A landlord may enforce collection of rent due by distress in the following manner, to wit:

Any magistrate in the county in which the premises occupied are situated may issue, upon receipt of an affidavit of the landlord or his agent setting forth the amount of rent due, his distress warrant in which shall be named the amount of rent due with costs and such warrant shall be delivered to (a) any regular constable, (b) such special constable as the magistrate may appoint or (c) the sheriff of the county for enforcement.

SEC. 41-153. *Distraint on tenant's property if rent and cost not paid.*

Such officer shall forthwith demand of the tenant payment of the rent with costs as named in the distress warrant. If such amount be paid the officer shall return the warrant with the amount collected to the magistrate who shall settle with the landlord. But if the tenant fail or refuse to pay such rent with costs the officer shall distrain sufficient of the property upon the rented premises to pay such amount, giving the tenant a list in writing of the property distrained together with a copy of the distress warrant.

SEC. 41-158. *Only reasonable amount of property to be distrained.*

Any distress must be reasonable in respect to the amount of property distrained.

SEC. 41-159. *Damage for unreasonable distress.*

Any lessor or landlord who makes unreasonable and excessive distress shall be liable for all

damages sustained by the tenant whose goods are distrained by reason of such excessive distress. Such damage may be recovered by an action in any court of competent jurisdiction.

SEC. 41-160. *Tenant may free property from distraint by giving bond.*

Within five days after such distraint the tenant may free the property from the lien of the distraint by giving a bond payable to the landlord in double the amount claimed, with sufficient surety or sureties approved by the court, and the issues thus joined shall be tried by the court. The landlord shall have the right to except to the surety or sureties and the surety or sureties shall justify before the magistrate as provided for justification for sureties in claim and delivery actions.

SEC. 41-161. *Sale of property distrained.*

If the tenant fails to give bond as above prescribed then the officer may sell such property at public auction to the highest bidder for cash at a designated place of sale after posting a notice of such sale for five days upon the premises and two other public places in the county stating the time and place of such sale.

SEC. 41-162. *Taxes lien on property sold under distress.*

The purchaser at a sale of chattels seized under a distress warrant shall take the property subject to any lien for taxes thereon.

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No. 35

In the Supreme Court of the United States

OCTOBER TERM, 1954

UNITED STATES OF AMERICA, PETITIONER

v.

R. P. SCOVIL, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

BRIEF FOR THE UNITED STATES

SIMON E. SOBELOFF,
Solicitor General,
H. BRIAN HOLLAND,
Assistant Attorney General,
JOHN R. BENNEY,
ELLIS N. SLACK,
A. F. PRESCOTT,
FRED E. YOUNGMAN,
Special Assistants to the Attorney General,
Department of Justice,
Washington 25, D. C.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Supreme Court of South Carolina is reported at 78 S.E. 2d 277. The order of the Court of Common Pleas of Greenville County, South Carolina (R. 8-11) is not reported.

JURISDICTION

The judgment of the Supreme Court of South Carolina (R. 12-14), was entered October 26, 1953. On January 22, 1954, Mr. Chief Justice Warren extended the time for filing a petition for a writ

of certiorari to and including March 25, 1954. The petition for a writ of certiorari was filed March 16, 1954, and was granted on May 24, 1954. The jurisdiction of this Court is conferred by 28 U.S.C., Section 1257 (3).

QUESTIONS PRESENTED

1. Whether the priority accorded claims of the United States against the assets of an insolvent debtor by Section 3466 of the Revised Statutes is defeated by a landlord's lien for rent arrears created by state law, where the landlord has not divested the debtor of possession of any property subject to the lien.

2. Whether the lien accorded the United States by Section 3670 of the Internal Revenue Code of 1939 is rendered subordinate to a subsequently arising landlord's lien created by state law, merely because notice of the federal tax lien was filed after the landlord's lien arose.

STATUTES INVOLVED

Sections 3670, 3671, and 3672 (a) of the Internal Revenue Code of 1939; Section 3466 of the Revised Statutes; and Sections 41-151, 41-153, 41-158, 41-159, 41-160, 41-161, and 41-162 of Title 41, Chapter 4, of the South Carolina Code Annotated (1952 ed.), are set out in the Appendix, *infra,* pp. 36-40.

STATEMENT

This suit (originating as a receivership proceeding (R. 1)) involves the relative priority of tax claims of the United States and claims for rent of a landlord under a distress against the assets of

Dan Tassey, Inc., an insolvent corporation in receivership (hereinafter sometimes referred to as the taxpayer).

The material facts, as disclosed by the statement of the case (R. 1-2), the Master's Report (R. 2-8), and the opinions below (R. 8-11, 12-14), are not in dispute and may be summarized as follows: As the result of an action filed in the Court of Common Pleas of Greenville County, South Carolina, a receiver was appointed by that court on April 8, 1952, to take charge of the business operated by Dan Tassey, Inc., the delinquent taxpayer, and all of its assets. The receiver took charge of such assets as of the day of his appointment, and retained possession of them until May 15, 1952.[1] R. P. Scovil, respondent herein, is the owner of the building then occupied by the taxpayer. The taxpayer was occupying the property under a written lease dated October 12, 1949, for a full term of five years, at a rental of $250 per month payable in advance on the first of each month. The rent for the months of February, March, and April, 1952, being in arrears, the landlord (Scovil) proceeded on April 7, 1952, the day before the receiver was appointed and took possession of the taxpayer's assets, to distress upon all the assets of the taxpayer for such rent arrears. After the receiver

[1] While the record is not clear on this point, the Master's Report (R. 2-8), allowing rent to that date and certain other items as expense of administration, indicates that the assets of the taxpayer had been sold by May 15, 1952, and that the proceeds were insufficient to pay all claims against the insolvent.

took possession, the landlord filed with the receiver a claim for $750 as rent for the months of February, March, and April, 1952, contending that the claim constituted a prior lien on the assets of the taxpayer, junior only to the expenses of administration. (R. 1-3, 12.)

The United States also filed a claim with the receiver for unpaid federal taxes in the total amount of $3,991.06, which included withholding taxes assessed on assessment lists received by the Collector of Internal Revenue on March 19, 1951, May 24, 1951, August 29, 1951, and December 3, 1951, February 23, 1952, and February 28, 1952, with respect to all of which a notice of lien was filed in the Office of the Register Mesne Conveyances of Greenville County on April 10, 1952, and withholding taxes amounting to $653.77 with respect to which the date on which the assessment list was received by the the Collector is not shown.[2] (R. 2, 13.)

Both in the trial court and in the Supreme Court of South Carolina the United States asserted its right to priority in payment of its debts under Section 3466 of the Revised Statutes, and also contended that under Sections 3670, 3671, and 3672 of the Internal Revenue Code of 1939 it had liens on the property of the taxpayer which were prior

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[2] The Government's claim also included $441.96 income tax assessed on a list received by the Collector on December 14, 1950, and with respect to which a notice of lien was filed with the Register of Mesne Conveyances of Greenville County on April 2, 1951. This part of the Government's claim was allowed priority, however (R. 13), and is not involved here.

and superior to the landlord's distress for rent. The Master held (R. 4-5) that the landlord had acquired a specific and perfected lien upon the property of the taxpayer upon the issuance of the distress warrant, which was the day before the receiver was appointed, and that the lien of the distress for rent defeated the priority of the United States under Section 3466. The Master further held that the Government's liens under Section 3670 of the 1939 Code did not attach to the property upon which the landlord levied his distress until that specific lien had first been satisfied; that in the nature of things the landlord was a "purchaser" within the meaning of Section 3672 (a) of the Internal Revenue Code of 1939; and that the tax liens of the United States were subordinate to the lien of the distress for the reason that under South Carolina law the lien of a landlord for past due rent is superior to that of a mortgagee, except in two instances, and since a mortgage takes precedence over a federal tax lien until recorded as required by Section 3672 (a) the landlord's lien necessarily took precedence over the federal tax liens. (R. 5-6.) The trial court (on exceptions filed by the United States to the Master's Report (R. 2)) discussed only the Government's claim to priority under the lien provisions of the 1939 Code and concurred in the Master's conclusion that the landlord was a "purchaser" within the meaning of Section 3672 (a), but gave priority to one assessment of tax with respect to which notice of lien

was filed prior to the distress for rent (R. 9-10). (See fn. 2, *supra*, p. 4.)

In affirming the decision of the trial court, the Supreme Court of South Carolina held, first, that the landlord's lien was perfected the day before the receiver was appointed and that Section 3466 did not give the United States priority over a lien for rent. (R. 13.) It further held that the federal tax lien under Section 3670 of the 1939 Code "is of force against a Landlord's lien which has been perfected only from the date of recording of such tax lien and, therefore, not effective in the case at bar." (R. 14.)

SUMMARY OF ARGUMENT

I

Under the facts of this case the United States is entitled to priority in payment of its tax claims under Section 3466 of the Revised Statutes, which provides that in cases of insolvency where the debtor has made a voluntary assignment of all his property for the benefit of creditors or has committed an act of bankruptcy "the debts due to the United States shall be first satisfied". While the words of the statute are broad and sweeping and, on their face, admit of no exception to the priority of claims of the United States, this Court has in the past suggested that certain exceptions might be read into the statute, but it has never expressly decided whether the priority can be defeated by a prior specific and perfected adverse lien, although the question has been reserved many times.

In the instant case the courts below held that the landlord's distress for rent, issued the day before the appointment of a receiver who took over the insolvent debtor's property, gave rise to a prior specific and perfected lien, thus bringing this case within the suggested exception, and that for that reason the landlord's lien defeated the priority of the United States under Section 3466.

This Court has long held that the effect and operation of a state lien in relation to the claim of priority of the United States is always a federal question; that a state court's characterization of a lien, while entitled to weight, is not conclusive; that the priority accorded the United States cannot be impaired by state legislation or state court decisions creating interests in the debtor's property in favor of third persons; and that if a prior adverse lien is ever to defeat the priority of the United States under the statute, as a *minimum* requirement it must be definite, and not merely ascertainable in the future by taking further steps, as to the identity of the lienor, the amount of the lien, and the property subject to the lien. It is not enough that the lienor has the power to bring these three elements, or any of them, down from broad generality to the earth of specific identity. To be "specific" under the decisions of this Court, the adverse lien must, among other requirements, attach to specific items of the debtor's property; and to be "perfected" under the decisions, the adverse lien must be enforced at least to the point of divesting the debtor of either title or possession.

The prior adverse lien here involved is not sufficiently specific and perfected, under the decisions, to bring this case within the suggested exception—assuming, without conceding, that such an exception can be read into the statute. The distress for rent was issued upon all the property of the debtor, and it is not shown that any particular property was set aside from the taxpayer's general assets for payment of the landlord's claim as contemplated by the statute. Thus the resulting lien is lacking in the required specificity. Also, the record fails to show that either title or possession of the debtor's property was affected by issuance of the distress warrant. He had five days from service of the distress warrant to post a surety bond and free his property from the distress. Before this period expired a receiver was appointed who took over the property, thus indicating that the landlord's lien likewise was lacking in the perfection required by the decisions. Furthermore, the record fails to show that the landlord's lien was sufficiently definite, either as to the amount of the lien or the property to which it attached, to meet the minimum requirements indicated in the decisions.

Even if the state courts' characterization of the landlord's lien as specific and perfected be accepted, however, we submit that the United States still is entitled to priority under Section 3466. This Court has never held that an exception actually exists in the case of a prior specific and perfected lien. The cases in which the question has been reserved indicate that, rather than such an implied

exception, the Court has in fact recognized that the priority accorded the United States does not extend to property which has been so far subjected to the satisfaction of a prior adverse claim that it no longer can be considered a part of the insolvent's estate subject to the priority, and the recent decisions in *United States* v. *Gilbert Associates,* 345 U. S. 361, and *United States* v. *New Britain,* 347 U. S. 81, indicate that the priority of the United States under this statute is absolute. The statute, where applicable, provides that "the debts due to the United States shall be first satisfied", and it has never been held that Congress, acting under the powers granted it by the Constitution, cannot place debts due the United States ahead of all other claims against an insolvent debtor.

II

The tax liens of the United States under Sections 3670 and 3671 of the Internal Revenue Code were prior in time and superior in right to any lien acquired by the landlord as a result of his distress for rent and the United States is entitled to preference in the payment of its claim for that reason. The tax liens of the United States arose on various dates from March 19, 1951, to February 28, 1952, both inclusive (except for one assessment of $653.77 with respect to which the date the assessment list was received by the Collector was not available), and clearly attached to "all property and rights to property" of the delinquent taxpayer. On the other hand, the landlord acquired no lien whatever

on property of the taxpayer prior to issuance of the distress for rent on April 7, 1952, and regardless of any rights his distress for rent may have given him as against others it could not defeat the prior liens of the United States. The federal tax liens were first in time and prior in right, and entitled to priority in payment. *United States* v. *New Britain,* 347 U.S. 81; *Michigan* v. *United States,* 317 U.S. 338.

The courts below did not question the priority of the federal tax liens in point of time, but held that the landlord was protected by Section 3672 of the Internal Revenue Code, which provides that the lien of the United States shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice of lien has been filed as therein provided, presumably on the ground that the landlord was a "purchaser" within the meaning of the statute, and since notice of the federal liens was not filed until April 10, 1952, the liens were not valid as against the landlord. It is clear from the decisions of this Court in *United States* v. *Gilbert Associates,* 345 U.S. 361, and *United States* v. *Security Tr. & Sav. Bk.,* 340 U.S. 47, that the landlord was not a "judgment creditor" within the meaning of Section 3672, and we submit likewise was not a "purchaser" within the meaning of that section. His distress for rent merely gave him a right to proceed against property of the taxpayer for satisfaction of his claim. There was no transfer of title or possession of the property and no passing of present consideration.

The tax liens of the United States were first in time and prior in right, and under the decision of this Court in *United States* v. *New Britain*, 347 U.S. 61, should be first paid.

ARGUMENT

I

The United States Is Entitled Under Section 3466 of the Revised Statutes to Priority in Payment of Its Claims for Unpaid Taxes

Regardless of the Government's rights as a prior lien claimant, discussed at pages 26-34, *infra*, its claim against the insolvent debtor for unpaid taxes is entitled to priority under Section 3466 of the Revised Statutes (Appendix, *infra*, p. 37), which provides:

> Whenever any person indebted to the United States is insolvent, * * * the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

In view of the insolvency of the debtor and the appointment of a receiver of its business and assets, the applicability of the above section to this case is clear. *United States* v. *Oklahoma*, 261 U.S.

253, 259-260; *Bramwell* v. *U. S. Fidelity Co.*, 269 U.S. 483, 488-489; *Price* v. *United States*, 269 U.S. 492; *United States* v. *Texas*, 314 U.S. 480, 483-484; *Illinois* v. *Campbell*, 329 U.S. 362, 367-369.[3] Also, it is settled that the priority of the United States attaches at the time a receiver is appointed and takes over the taxpayer's business and assets. *Spokane County* v. *United States*, 279 U.S. 80, 93; *United States* v. *Oklahoma*, *supra*, p. 260; *Illinois* v. *Campbell*, *supra*, pp. 370, 373; *Massachusetts* v. *United States*, 333 U.S. 611, 617, fn. 8. "Once attaching, it is final and conclusive." *Massachusetts* v. *United States*, *supra*, p. 625.

In *United States* v. *Waddill Co.*, 323 U.S. 353, this Court said that the words of Section 3466 "are broad and sweeping and, on their face, admit of no exception to the priority of claims of the United States," and added (p. 355):

> But this Court in the past has recognized that certain exceptions could be read into this statute. The question has not been expressly decided, however, as to whether the priority of the United States might be defeated by a specific and perfected lien upon the property at the time of the insolvency or voluntary assignment. *Conard* v. *Atlantic Insurance Co.*, 1 Pet. 386, 441, 444; *Brent* v. *Bank of Washington*, 10 Pet. 596, 611, 612; *Spokane County* v.

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[3] Taxes are "debts" of the United States within the purview of Section 3466. *Price* v. *United States*, 269 U.S. 492, 499-501; *Illinois* v. *United States*, 328 U.S. 8; *Massachusetts* v. *United States*, 333 U.S. 611, 625, fn. 24.

United States, 279 U.S. 80, 95; *United States* v. *Knott*, 298 U.S. 544, 551; *New York* v. *Maclay, supra*, 292, 294; *United States* v. *Texas, supra*, 485, 486. It is within this suggested exception that the landlord and the municipality seek to bring themselves.

Although suggesting that certain exceptions may be read into the priority statute this Court has, in a long line of decisions including the decisions cited in the above quotation, held that an adverse lien which has not become both specific and perfected before the debtor becomes insolvent cannot serve to deprive the United States of its right to priority under the statute. See, also, *Illinois* v. *Campbell*, 329 U.S. 362, 370; *United States* v. *Gilbert Associates*, 345 U.S. 361, 365. Compare *Illinois* v. *United States*, 328 U.S. 8; *Massachusetts* v. *United States*, 333 U.S. 611; *United States* v. *Security Tr. & Sav. Bk.*, 340 U.S. 47; *United States* v. *New Britain*, 347 U.S. 81.

In the instant case, both the Master (R. 5) and the Supreme Court of South Carolina (R. 13) held that the landlord's distress for rent, issued the day before the receiver was appointed and took over the taxpayer's property, gave rise to a specific and perfected lien upon the delinquent taxpayer's property prior to the time the priority of the United States under Section 3466 attached, thus bringing the case within the suggested exception to the priority statute, and on that ground held that the landlord's lien defeated the priority of the United

States. We submit that this conclusion is contrary to the decisions of this Court.

In the first place, the state courts' characterization of the lien here involved is not conclusive on the Federal Government.[4] The effect and operation of a state lien in relation to the claim of priority of the United States under Section 3466 is always a federal question. Hence a state court's characterization of a lien as specific and perfected is not conclusive. The state characterization, though entitled to weight, is always subject to reexamination by this Court. *United States* v. *Waddill Co., supra,* p. 357; *Illinois* v. *Campbell, supra,* p. 371; *United States* v. *Gilbert Associates, supra,* p. 363. See, also, *United States* v. *Security Tr. & Sav. Bk., supra,* p. 51; *United States* v. *New Britain, supra,* p. 84. And the priority accorded the United States under that statute cannot be impaired by state legislation or state court decisions creating interests in the debtor's property in favor of third persons. *United States* v. *Oklahoma,* 261 U.S. 253, 260; *Illinois* v. *Campbell, supra,* p. 371. The character of the adverse lien depends upon its substance, not terminology. And while this Court has not determined to what extent an adverse lien must have ripened into an interest in the prop-

[4] The Supreme Court of South Carolina said (R. 13): "There is no question in this case of distress having been perfected prior to the appointment of the receiver." The record does not show any concession to that effect on the part of the Government; nor does it show that anything more than issuance of the distress warrant on April 7, 1952, was done in the matter prior to the appointment of the receiver on April 8th.

erty of the debtor before the priority of the United States attaches, the opinion in *Illinois* v. *Campbell, supra,* makes it clear that if an adverse lien ever is to defeat the federal priority, as a *minimum* requirement (p. 375)—

> the lien must be definite, and not merely ascertainable in the future by taking further steps, in at least three respects as of the crucial time. These are: (1) the identity of the lienor, *United States* v. *Knott,* 298 U.S. 544, 549-551; (2) the amount of the lien, *United States* v. *Waddill Co.,* 323 U.S. at 357-358; and (3) the property to which it attaches, *United States* v. *Waddill Co., supra; United States* v. *Texas, supra; New York* v. *Maclay, supra. It is not enough that the lienor has power to bring these elements, or any of them, down from broad generality to the earth of specific identity.* [Italics supplied.]

Lack of definiteness as to the property subject to the adverse lien was an important consideration in *Illinois* v. *Campbell, supra, United States* v. *Waddill Co., supra,* and *United States* v. *Texas, supra.* However, in all three cases this Court emphasized that definiteness as to amount likewise is an essential factor in determining whether local statutory liens are specific and perfected. In *United States* v. *Texas, supra* (p. 487), while the Court pointed out that the "property devoted to or used in his business as a distributor," to which the state lien for taxes attached, "is neither specific nor

constant," it added: "But a more important consideration is that the *amount* of the claim secured by the lien is unliquidated and uncertain." (Italics supplied.) And in *United States* v. *Waddill Co., supra,* in holding the amount claimed as rent was uncertain, the Court said (pp. 357-358): "The landlord may have been mistaken as to the rental rate or as to payments previously made and the tenant may have been entitled to a set-off".

To be "specific" under the decisions of this Court, the adverse lien must, among other requirements, attach to specific items of the debtor's property. *United States* v. *Texas, supra,* p. 485; *United States* v. *Waddill Co., supra,* p. 359; *Illinois* v. *Campbell, supra,* pp. 373, 375-376. Compare *United States* v. *New Britain, supra,* p. 84. In *United States* v. *Gilbert Associates, supra,* p. 366, this Court said:

> In claims of this type, "specificity" requires that the lien be attached to certain property by reducing it to possession, on the theory that the United States has no claim against property no longer in the possession of the debtor. *Thelusson* v. *Smith,* 2 Wheat. 396. Until such possession, it remains a general lien.

To be "perfected" under the decisions of this Court, the adverse lien must be enforced at least to the point of divesting the debtor of either title or possession. *United States* v. *Waddill Co., supra,* pp. 357-360; *Illinois* v. *Campbell, supra,* pp. 375-376; *United States* v. *Gilbert Associates, supra,* pp.

365-366. Compare *United States* v. *Security Tr. & Sav. Bk., supra*, p. 51; *United States* v. *New Britain, supra*, p. 84.

On the basis of this Court's decisions it is clear, we submit, that the distress for rent issued by the Court of Common Pleas in this case the day before the receiver was appointed was not a lien of the character that will defeat the priority of the United States under Section 3466. The distress was issued pursuant to provisions of South Carolina law giving landlords this extraordinary remedy for enforcing the collection of rent arrears.[5] Section 41-151 of the South Carolina Code, authorizing the collection of rent by distress, provides that any magistrate in the county in which the premises occupied are situated, upon affidavit of the landlord or his agent setting forth the amount of rent due, may issue his distress warrant in which shall be named the amount of rent due with costs, and the warrant shall then be delivered to any regular constable, such special constable as the magistrate may appoint, or to the sheriff of the county, for enforcement. Section 41-153 of the South Carolina Code provides that such officer shall forthwith demand of the tenant payment of the rent with costs as named in the warrant. If the amount be paid, the officer shall return the warrant with the amount collected to the magistrate, who shall settle with the landlord. But if the tenant fails or refuses to

[5] See Sections 41-151, 41-153, 41-158, 41-159, 41-160, 41-161, and 41-162, Title 41, Chapter 4, South Carolina Code Annotated (1952 ed.), Appendix, *infra*, pp. 38-40.

pay, the officer is required to "distrain sufficient of the property upon the rented premises to pay such amount," giving the tenant a list in writing of the property distrained together with a copy of the distress warrant. Section 41-158 provides that any distress must be reasonable with respect to the amount of property distrained, and Section 41-159 provides that any lessor or landlord who makes unreasonable and excessive distress shall be liable for all damages sustained by the tenant whose goods are distrained by reason of such excessive distress. Section 41-160 provides that within five days after distraint (which period had not expired here when the receiver was appointed) the tenant may free the property from the lien of the distraint by giving a bond payable to the landlord in double the amount claimed, with sufficient surety or sureties approved by the court, and the issues thus joined shall be tried by the court. Section 41-161 provides that if the tenant fails to give bond as provided by Section 41-160, then the officer may sell such property at public auction to the highest bidder for cash at a designated place of sale after posting a notice of such sale for five days upon the premises and two other public places in the county stating the time and place of such sale, and Section 41-162 provides that the purchaser at a sale of chattels seized under a distress warrant "shall take the property subject to any lien for taxes thereon."

A landlord apparently has no lien for rent under South Carolina law (other than an agricul-

tural lien),[6] except such as may result from a distress for rent under the above provisions of the South Carolina Code. Compare *Fidelity Trust & Mortgage Co.* v. *Davis*, 158 S. C. 400, 155 S. E. 622; *Ex Parte Stackley*, 161 S. C. 278, 159 S. E. 622, and cases cited.[7] Accordingly, it must be concluded that the landlord had no lien whatever in the instant case prior to issuance of the distress warrant on April 7, 1952. Furthermore, the record in this case does not show that the landlord actually did more than cause the distress warrant to be issued the day before the receiver was appointed and took over all of the delinquent taxpayer's property, although the report of the Master and the opinions of the court below seem to proceed on the premise that distress also was levied.[8]

Even if the distress warrant was served on April 7, 1952, and levy was made in accordance with the South Carolina statute, as apparently assumed by the courts below (R. 2, 4, 10, 12; see, also Br. in Opp. herein, p. 4), we submit the resulting lien was

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[6] The statutory liens authorized by South Carolina law are provided for in Title 45 (Sections 45-1 to 45-557, inclusive) of the South Carolina Code Annotated (1952 ed.), including provisions for an agricultural lien (Sections 45-501 to 45-513), not applicable here.

[7] See, also, *Shalet* v. *Klauder*, 34 F. 2d 594 (C.A. 3d); *In re Wall*, 60 F. 2d 573 (E.D. Miss.); *Hay* v. *Patrick*, 79 F. 2d 407 (C.A. 3d); *American Exchange Bank* v. *Goodlee Realty Corp.*, 135 Va. 204, 116 S.E. 505; *Corley-Powell Produce Co.* v. *Allen*, 42 Ga. App. 641, 157 S.E. 251; *State* v. *Gould*, 32 Del. 561, 127 Atl. 506.

[8] The statement of the case (R. 1) is to the effect that "the Landlord, on the 7th day of April, 1952, distressed upon all assets of said corporation for the rent then in arrears * * *."

not sufficiently specific and perfected under the decisions of this Court to defeat the priority of the United States—assuming such an implied exception can be read in the statute. The taxpayer had five days thereafter in which to furnish a surety bond to free his property from the distraint.[9] Before this period expired, the court authorizing the distress appointed a receiver and ordered him to take over the business and property of the debtor. By contrast, in *United States* v. *Gilbert Associates, supra,* there were indications that the property of the insolvent debtor had been "sold" by the town at a tax sale before (and again after) the appointment of the receiver.[10]

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[9] In the brief in opposition (p. 4), counsel assert that the right to substitute acceptable security for the distressed property in no way impugns the perfection of the lien. Such substitution no doubt serves the purposes of the state law and affords adequate protection to the landlord. But it is a clear indication that the rights of the landlord had not ripened into either title or possession at the time the receiver was appointed. At best, the property was held in a form of *custodia legis* pending determination of the landlord's rights.

[10] In the brief in opposition herein (pp. 4-5) counsel for the landlord state that the possession of the receiver was with the consent of the landlord, who merely agreed to forego the foreclosing of his perfected lien by the sale as provided for in the statute, so that all priorities of liens could be determined in the receivership proceedings. But there is nothing in the record to support this statement. Compare *Goggin* v. *California Labor Div.*, 336 U.S. 118. Counsel cited no authority to show the landlord had acquired any rights under which he could have prevented such action. Furthermore, the landlord submitted his claim to the receiver for rent arrears as a secured creditor, just as any other secured creditor would have done.

Also, except for the fact that in this case the distress for rent was issued the day before the receiver was appointed while in *United States* v. *Waddill Co., supra,* the distress for rent was issued twelve days after the deed of assignment was executed, a fact which seems to be in no wise determinative, the landlord's lien seems to be subject to the same infirmity of indefiniteness in amount as was the landlord's lien in the latter case. And, so far as the record shows, it was just as indefinite as to the property subject to the lien as was the landlord's lien in the *Waddill* case. The record indicates that all of the property of the taxpayer was distrained, which would seem to indicate a general, rather than specific, lien under the decisions of this Court. (R. 1, 12.) *United States* v. *Gilbert Associates, supra,* p. 366; *United States* v. *New Britain, supra,* p. 84.

The Supreme Court of South Carolina predicated its decision, in part, on the proposition that "The Government could have no greater right in the property in the hands of the receiver than the insolvent." (R. 13.) This statement fails to recognize the paramount right of the United States to provide for the collection of its debts. The taxpayer's rights in the property after appointment of the receiver were nil—unless, of course, a surplus should remain after payment of creditors. The United States does not stand in the shoes of the insolvent, and is not claiming under any right of subrogation. It is claiming as a creditor, just as the landlord is, but under a priority granted by

Congress, and this Court has never held that Congress, acting under the powers granted to it by the Constitution, cannot place the debts of the United States ahead of all other debts owing by an insolvent debtor.

Even if the South Carolina courts' characterization of the landlord's lien as specific and perfected be accepted, however, we submit it still will not defeat the priority of the United States under Section 3466 of the Revised Statutes. That section was derived from early statutes enacted to protect the Government in the collection of its taxes, particularly the Act of March 3, 1797, c. 20, 1 Stat. 512, Sec. 5, which was amended by the Act of March 2, 1799, c. 22, 1 Stat. 627, Sec. 65. *Price* v. *United States*, 269 U.S. 492, 500-501; *Spokane County* v. *United States*, 279 U.S. 80, 86-90. As pointed out by this Court in *United States* v. *Waddill Co.*, *supra*, p. 355, the words of the statute "are broad and sweeping and, on their face, admit of no exception to the priority of claims of the United States." In a long line of decisions, extending back to *United States* v. *Fisher*, 2 Cranch 358, *Thelusson* v. *Smith*, 2 Wheat. 396, and *Conard* v. *Atlantic Insurance Co.*, 1 Pet. 386, this Court has, except where the property sought to be subjected to the priority was no longer the property of the insolvent debtor (*Brent* v. *Bank of Washington*, 10 Pet. 596; *Beaston* v. *Farmers' Bank*, 12 Pet. 102), uniformly upheld the priority of the United States

in every case in which the statute has been found to be applicable.[11]

While in the past this Court has, as stated above, suggested that exceptions may be read into the priority statute, the nature or extent of such suggested exceptions have not been made entirely clear. In fact, while the question of a possible exception in the case of a prior specific and perfected lien has been posed in several cases (*United States* v. *Waddill Co., supra,* p. 355, and cases cited), this Court has never actually held there is an exception to the absolute priority accorded the United States by the statute. For instance, in *Illinois* v. *Campbell,* where exception was urged on the ground that the state tax liens there involved were specific and perfected prior to appointment of a receiver, the question again was reserved because this Court (p. 372) found it clear, quite apart from anything said in the Illinois Supreme Court's opinion, "that the lien was not so specific and perfected as to defeat the priority of the United States, *if that is at all possible.*" (Italics supplied.) Later, in *Massachusetts* v. *United States,* 333 U.S. 611, this Court refused to recognize any exception to the absolute

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[11] See, also, *Field* v. *United States,* 9 Pet. 182; *Bramwell* v. *U. S. Fidelity Co.,* 269 U.S. 483; *New York* v. *Maclay,* 288 U.S. 290, 293-294, and cases cited; *United States* v. *Emory,* 314 U.S. 423; *United States* v. *Texas,* 314 U.S. 480; *United States* v. *Waddill Co.,* 323 U.S. 353; *Illinois* v. *United States,* 328 U.S. 8; *Illinois* v. *Campbell,* 329 U.S. 362; *Massachusetts* v. *United States,* 333 U.S. 611, and cases cited in fn. 24, pp. 625-626.

priority of the United States under Section 3466, saying (p. 625) that the section "gives priority explicitly for '*debts* due to the United States' and the priority given is in terms absolute, not conditional. Once attaching, it is final and conclusive." In a subsequent footnote in that case (fn. 38, p. 634) it was pointed out that the original departures by the Court from the conclusive language of the statute—

> indeed did not contemplate that exceptions were being made. They conceived that the funds or property affected, being covered by mortgage, belonged in fact to third persons, not to the insolvent debtor. [Citations.] The Court has been loath to expand these exceptions, * * *, to include other types of lien.

Again, in *United States* v. *Gilbert Associates, supra,* p. 365, it is said: "This Court has never actually held that there is such an exception." Finally, in *United States* v. *New Britain,* 347 U. S. 81, in pointing out the difference between the lien of the United States under Section 3670 of the Internal Revenue Code of 1939 for unpaid taxes (discussed hereafter) and the priority of the United States under Section 3466 of the Revised Statutes, this Court said (p. 85):

> When the debtor is insolvent, Congress has expressly given priority to the payment of indebtedness owing the United States, *whether secured by liens or otherwise*, by § 3466 of the Revised Statutes, 31 U.S.C. (1946 ed.) § 191.

> In that circumstance, where all the property of the debtor is involved, Congress has protected the federal revenues by imposing an *absolute* priority. [Italics supplied.]

Examination of the above and other decisions of this Court on the subject indicates that, rather than recognizing any implied exception to the priority statute, the Court has recognized only that the priority accorded the United States by the statute does not extend to property of an insolvent which has been so far subjected to the satisfaction of a prior adverse claim that it no longer can be considered a part of the insolvent's estate subject to such priority. Compare *Brent* v. *Bank of Washington*, 10 Pet. 596; *Beaston* v. *Farmers' Bank*, 12 Pet. 102.[12]

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[12] This early implied exception to the priority statute apparently has led to much of the litigation on the subject which has found its way to this Court in later years, and seems still to be a source of confusion among the lower courts, as indicated by the decision below in the instant case. For instance, see the recent decisions of the Court of Appeals for the Fifth Circuit in *United States* v. *Atlantic Municipal Corp.*, 212 F. 2d 709, and *United States* v. *Fidelity & Deposit Co. of Maryland*, decided July 6, 1954 (1954 P-H. par. 72,665), affirming 108 F. Supp. 360 (S.D. Miss.). Earlier, in *United States* v. *Albert Holman Lumber Co.*, 206 F. 2d 685, 688, rehearing denied, 208 F. 2d 113, and *United States* v. *Liverpool & London & Globe Ins. Co.*, 209 F. 2d 684, 687 (now pending on certiorari, No. 34, October Term, 1954), both of which involve only the question of priority of liens, the same Court of Appeals quoted the concluding portion of a single sentence from this Court's opinion in *United States* v. *Knott*, 298 U.S. 544, 551, as authority for the proposition that a prior specific and perfected lien will defeat the priority of the United States. However, the *Knott* decision, like the others cited, did not

In any event, we submit that the priority of the United States under Section 3466 of the Revised Statutes is superior to the landlord's distress on the property here involved. The property belonged to the insolvent debtor at the time the receiver was appointed, and it was taken over by him and administered as such. Congress has by statute provided that in such cases "the debts due to the United States shall be first satisfied," thereby placing the debts due the United States ahead of all other debts owing by an insolvent debtor, "whether secured by liens or otherwise" (*United States* v. *New Britain*, *supra*, p. 85), and that includes the debt for taxes here involved.

II

Regardless of the Priority of the United States Under Section 3466 of the Revised Statutes, Its Tax Liens Were Prior in Time and Superior in Right to the Landlord's Claim Based on His Distress for Rent

The court below also was in error in holding that the landlord's claim for rent arrears, based upon the distress warrant issued April 7, 1952, was entitled to preference over the tax liens of the United States asserted under Sections 3670 and 3671 of the Internal Revenue Code of 1939 (Appendix, *infra*, p. 37). These sections provide that if any person liable to pay any tax neglects to pay such tax after demand the amount (including any interest, penalty, additional amount, or addition

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so hold, but merely held the lien there involved did not defeat the priority of the United States. See *Illinois* v. *Campbell*, 329 U.S. 362, 370, fn. 10.

to the tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States "upon all property and rights to property, whether real or personal, belonging to such person;" and that, unless another date is specifically fixed by law, the lien shall arise at the time the assessment list is received by the Collector (now Director) and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.[13]

The federal taxes here involved were assessed on assessment lists received by the Collector on various dates between March 19, 1951, and February 28, 1952, both inclusive, plus an additional amount of $653.77 with respect to which the date of receipt of the assessment list by the Collector is not shown. (R. 4, 8-9, 13.) Thus the liens of the United States for its delinquent taxes (with the exception of the one item) clearly arose and attached to all property and rights to property of the delinquent taxpayer prior to the time any lien could have been acquired by the landlord as a result of the distress for rent issued on April 7, 1952. Regardless of any rights his distress for rent may have given the landlord as against others, we submit it cannot defeat the prior tax liens of the United States.

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[13] The general federal tax lien provisions here involved are incorporated in substantially unchanged form in Sections 6321, 6322, and 6323 of the Internal Revenue Code of 1954 (P.L. 591, 83d Cong., 2d Sess.). See also, H. Rep. No. 1337, 83d Cong., 2d Sess., pp. A406-A407; S. Rep. No. 1622, 83d Cong., 2d Sess., pp. 575-576.

In this situation the decisions of this Court in *Michigan* v. *United States*, 317 U.S. 338, and *United States* v. *New Britain*, 347 U.S. 81, are clearly controlling. See also *Detroit Bank* v. *United States*, 317 U.S. 329. Compare *Goggin* v. *California Labor Div.*, 336 U.S. 118. In *Michigan* v. *United States*, *supra*, this Court, citing Article I, Section 8 of the Constitution, and *United States* v. *Snyder*, 149 U.S. 210, held that the establishment of a tax lien by Congress is an exercise of its constitutional power "to lay and collect taxes", and that laws of Congress enacted pursuant to the Constitution are by Article VI of the Constitution declared to be "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." The opinion then continued (p. 340):

> "It is of the very nature and essence of a lien, that no matter into whose hands the property goes, it passes *cum onere*." *Burton* v. *Smith*, 13 Pet. 464, 483; *Rankin* v. *Scott*, 12 Wheat. 177, 179; *Howard* v. *Railway Co.*, 101 U.S. 837, 845. Hence it is not debatable that a tax lien imposed by a law of Congress, as we have held the present lien is imposed, cannot, without the consent of Congress, be displaced by later liens imposed by authority of any state law or judicial decision.

In the instant case the tax liens of the United States were prior in time to any lien of the landlord

for rent, and, being perfected liens upon all the property and rights to property of the delinquent taxpayer, they also were prior in right under the decisions in the *Michigan* and *New Britain* cases, *supra*. The courts below based their decision to the contrary on Section 3672 (a) of the 1939 Code (Appendix, *infra*, pp. 36-37), which, so far as material to this discussion, provides that the lien under Section 3670 "shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor," until notice thereof has been filed by the Collector as therein provided. This latter section does not prevent the tax lien from attaching to "all property and rights to property" of the delinquent taxpayer, but merely provides that it "shall not be valid" as against the four categories of interest enumerated until duly recorded. In *United States* v. *New Britain, supra*, this Court said (p. 88):[14]

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[14] Sections 3670, 3671 and 3672 of the 1939 Code were based on Section 3186 of the Revised Statutes, as amended by the Act of March 4, 1913, c. 166, 37 Stat. 1016; the Act of February 26, 1925, c. 344, 43 Stat. 994; and Section 613 of the Revenue Act of 1928, c. 852, 45 Stat. 791. Protection against this secret lien of the United States was first extended to mortgagees, purchasers, and judgment creditors by the Act of March 4, 1913, as a result of this Court's decision in *United States* v. *Snyder*, 149 U.S. 210. See H. Rep. No. 1018, 62d Cong., 2d Sess., p. 1; S. Rep. No. 1315, 62d Cong., 3d Sess., p. 1. See, also, *United States* v. *Curry*, 201 Fed. 371 (D. Md.). This provision was carried into Section 3672 (a) of the Internal Revenue Code of 1939, which, as a result of the decision in *United States* v. *Rosenfield*, 26 F. Supp. 433 (E.D. Mich.), reversed October 9, 1939, *sub nom. Morrison* v. *United States*, (C.A. 6th), 26 A.F.T.R. 1205, was amended, among other things, to include "pledgees". See H. Rep. No. 855, 76th Cong., 1st Sess., p. 26 (1939-2 Cum. Bull. 504, 524); *United States* v.

> There is nothing in the language of § 3672 to show that Congress intended antecedent federal tax liens to rank behind any but the specific categories of interests set out therein, and the legislative history lends support to this impression.

In this case, the Master held, among other things (R. 5-7),[15] that the landlord was a "purchaser" within the meaning of Section 3672 (a) of the 1939 Code, and that accordingly the federal tax liens were not valid against the landlord until recorded. The trial court agreed with the Master's reasoning

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Security Tr. & Sav. Bank., 340 U.S. 47, 52-53. Section 3672 again was amended by Section 505 of the Revenue Act of 1942, c. 619, 56 Stat. 798.

[15] The Master also held (R. 6-7), on authority of *Ferris* v. *Chic-Mint Gum Co.*, 14 Del. Ch. 232, 124 Atl. 577, and similar cases, that under South Carolina law a landlord's distress for rent is superior to that of a mortgage (except in two instances), and since the federal lien is not valid as against a mortgage until notice is filed, it necessarily follows that the landlord's lien takes precedence over the federal tax lien. That conclusion is also completely refuted by the decision of this Court in *United States* v. *New Britain, supra*, where it is said (p. 88):

> The United States is not interested in whether the State receives its taxes and water rents prior to mortgagees and judgment creditors. That is a matter of state law. But as to any funds in excess of the amount necessary to pay the mortgage and judgment creditors, Congress intended to assert the federal lien. There is nothing in the language of § 3672 to show that Congress intended antecedent federal tax liens to rank behind any but the specific categories of interests set out therein, and the legislative history lends support to this impression.

See also, *Spokane County* v. *United States*, 279 U.S. 80, 91; *California State Dept. of Employ.* v. *United States*, 210 F. 2d 242 (C.A. 9th).

(R. 10), and the Supreme Court of South Carolina apparently concurred, because it said the statute provides that federal liens "shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector" (R. 13), and that (R. 14)——

> The Government's tax lien under this section is of force against a Landlord's lien which has been perfected only from the date of recording of such tax lien and, therefore, not effective in the case at bar.

The landlord obviously did not become a "judgment creditor" within the meaning of Section 3672 (a) of the 1939 Code by the issuance, or even the service, of the distress for rent under South Carolina law. *United States* v. *Gilbert Associates, supra; United States* v. *Security Tr. & Sav. Bk., supra.* See also *MacKenzie* v. *United States,* 109 F. 2d 540 (C.A. 9th); *Miller* v. *Bank of America, N. T. & S. A.,* 166 F. 2d 415 (C.A. 9th). It is equally clear, we submit, that the landlord did not become a "purchaser" within the meaning of Section 3672 (a) upon the issuance, or service, of the distress for rent under state law.[16] As this Court held in *United States* v. *Gilbert Associates, supra,* p. 364, with respect to the use of the term "judg-

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[16] Compare *United States* v. *Eisinger Mill & Lumber Co.,* 202 Md. 613, 98 A. 2d 81, in which case the trial court had held a mechanic's lien claimant under Maryland law to be a "pledgee" within the meaning of Section 3672 (a) of the Internal Revenue Code.

ment creditor" in Section 3672, Congress must also have used the term "purchaser" in that section in the usual, conventional sense. Otherwise, the uniformity in application contemplated by the statute would be defeated.

Issuance of the distress for rent did not effect a transfer of title or possession, and no present consideration passed. Issuance of the distress warrant merely created a preference in favor of the landlord, with the further right to have so much of the distrained property sold as might be necessary to satisfy his claim for rent arrears. Any contention that the landlord became a "purchaser" upon issuance of the distress warrant is completely negated by the fact that on the following day all of the taxpayer's property was turned over to the receiver appointed by the Court of Common Pleas, and the landlord filed his claim with the receiver for his unpaid rent.[17]

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[17] The courts below cited no authority for the proposition that the landlord became a "purchaser" upon issuance of the distress warrant, the only authorities cited being *Cranford Co.* v. *L. Leopold & Co.*, 189 Misc. 388, 70 N.Y.S. 2d 183, affirmed, 273 App. Div. 754, 75 N.Y.S. 2d 512, motion for leave to appeal denied, 273 App. Div. 846, 76 N.Y.S. 2d 839, motion for leave to appeal dismissed, 297 N.Y. 884, 79 N.E. 2d 279, and *National Refining Co.* v. *United States*, 160 F. 2d 951 (C.A. 8th), cited in the Master's report. (R. 6.) The latter case, whether right or wrong on this issue, clearly is not in point because there the Court of Appeals concluded (p. 955) that the assignee, for a valuable present consideration, acquired an interest in the assignor's property which constituted the assignee a "purchaser" within the meaning of the statute. *Cranford Co.* v. *L. Leopold & Co.*, *supra*, holding a mechanic's lien claimant under New York law to be a "purchaser" within the

The statement of the Supreme Court of South Carolina (R. 14) that the Government's tax lien is, under Section 3672 "of force against a Landlord's lien which has been perfected only from the date of recording of such tax lien * * *," further carries with it the suggestion that the court on authority of the cases cited in the Master's report, and particularly *Regan* v. *Metropolitan Haulage Co.*, 127 N.J. Eq. 487, 14 Atl. 2d 257 (R. 5), was of the opinion that the liens of the United States, being general liens, do not attach to any specific property covered by a valid specific lien until after the specific lien is first satisfied. But any such conclusion is definitely contrary to the decision in *United States* v. *New Britain, supra.* The tax lien of the United States attaches to "all property and rights to property" of the delinquent taxpayer. On that basis it has been characterized as a general lien rather than a specific lien. *United States* v. *Gilbert Associates, supra,* p. 365. However, the federal lien also is a perfected lien, in the sense that there is nothing more to be done to have a choate lien. *United States* v. *New Britain, supra,* p. 84. In this situation, this Court pointed out in the *New Britain* case, with respect to the statutory liens there involved that (p. 84) "the fact that one group of liens is specific and the other general in and of itself is of no significance in these cases involving statutory liens on real estate only"; that while a mortgage is

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meaning of the federal statute, clearly is wrong and without authority in law. See *United States* v. *Eisinger Mill & Lumber Co., supra,* fn. 16, p. 31.

a specific lien, yet a statutory lien is as binding as a mortgage, and has the same capacity to hold the land so long as it is in force; and that (p. 84)—

> the general statutory liens of the United States are as binding as the specific statutory liens of the City. The City gains no priority by the fact that its liens are specific while the United States' liens are general. Obviously, the State cannot on behalf of the City impair the standing of the federal liens, without the consent of Congress.

We find no basis in law or reason for holding that the general statutory lien of the United States is any less binding where the property of the delinquent taxpayer is personalty rather than real property.

The tax liens of the United States were first in time and prior in right, and the fact that they were not recorded until three days after the landlord's distress for rent was issued is of no consequence under the circumstances. The United States is entitled to payment ahead of the landlord on that account as well as on account of the priority accorded under Section 3466 of the Revised Statutes.

CONCLUSION

The decision of the court below is clearly wrong. It is contrary to the decisions of this Court and should be reversed, and the case remanded with directions to accord the claim of the United States its proper priority.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.
H. BRIAN HOLLAND,
Assistant Attorney General.
JOHN R. BENNEY,
ELLIS N. SLACK,
A. F. PRESCOTT,
FRED E. YOUNGMAN,
Special Assistants to the Attorney General.

SEPTEMBER, 1954.

APPENDIX

Internal Revenue Code of 1939:

SEC. 3670. PROPERTY SUBJECT TO LIEN.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U.S.C. 1952 ed., Sec. 3670.)

SEC. 3671. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

(26 U.S.C. 1952 ed., Sec. 3671.)

SEC. 3672 [as amended by Sec. 401, Revenue Act of 1939, c. 247, 53 Stat. 862, and Sec. 505, Revenue Act of 1942, c. 619, 56 Stat. 798]. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*— Such lien shall not be valid as against any

mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

(1) *Under State or Territorial Laws.*—In the office in which the filing of such notice is authorized by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law authorized the filing of such notice in an office within the State or Territory; or

* * * * *

(26 U.S.C. 1952 ed., Sec. 3672.)

Revised Statutes of the United States:

SEC. 3466. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

(31 U.S.C. 1952 ed., Sec. 191.)

South Carolina Code Annotated (1952 ed.):

Title 41. Landlord and Tenant. Chapter 4. Collection of Rent by Distraint.

SEC. 41-151. *Collection of rent by distress.*

A landlord may enforce collection of rent due by distress in the following manner, to wit:

Any magistrate in the county in which the premises occupied are situated may issue, upon receipt of an affidavit of the landlord or his agent setting forth the amount of rent due, his distress warrant in which shall be named the amount of rent due with costs and such warrant shall be delivered to (a) any regular constable, (b) such special constable as the magistrate may appoint or (c) the sheriff of the county for enforcement.

SEC. 41-153. *Distraint on tenant's property if rent and cost not paid.*

Such officer shall forthwith demand of the tenant payment of the rent with costs as named in the distress warrant. If such amount be paid the officer shall return the warrant with the amount collected to the magistrate who shall settle with the landlord. But if the tenant fail or refuse to pay such rent with costs the officer shall distrain sufficient of the property upon the rented premises to pay such amount, giving the tenant a list in writing of the property distrained together with a copy of the distress warrant.

SEC. 41-158. *Only reasonable amount of property to be distrained.*

Any distress must be reasonable in respect to the amount of property distrained.

SEC. 41-159. *Damage for unreasonable distress.*

Any lessor or landlord who makes unreasonable and excessive distress shall be liable for all damages sustained by the tenant whose goods are distrained by reason of such excessive distress. Such damage may be recovered by an action in any court of competent jurisdiction.

SEC. 41-160. *Tenant may free property from distraint by giving bond.*

Within five days after such distraint the tenant may free the property from the lien of the distraint by giving a bond payable to the landlord in double the amount claimed, with sufficient surety or sureties approved by the court, and the issues thus joined shall be tried by the court. The landlord shall have the right to except to the surety or sureties and the surety or sureties shall justify before the magistrate as provided for justification for sureties in claim and delivery actions.

SEC. 41-161. *Sale of property distrained.*

If the tenant fails to give bond as above prescribed then the officer may sell such property

at public auction to the highest bidder for cash at a designated place of sale after posting a notice of such sale for five days upon the premises and two other public places in the county stating the time and place of such sale.

SEC. 41-162. *Taxes lien on property sold under distress.*

The purchaser at a sale of chattels seized under a distress warrant shall take the property subject to any lien for taxes thereon.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

NO. 35

UNITED STATES OF AMERICA, *Petitioner*

v.

R. P. SCOVIL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

BRIEF FOR THE RESPONDENT IN OPPOSITION

THOMAS A. WOFFORD,
J. D. TODD, JR.
Greenville, South Carolina
Counsel for Respondent

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NO. 643

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v.

R. P. SCOVIL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of South Carolina in this case is reported at 78 S. E. 2d at Page 277.

JURISDICTION

The judgment of the Supreme Court of South Carolina was entered October 26, 1953. Petition for certiorari was filed on March 24, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1257 (3).

QUESTIONS PRESENTED

We agree with petitioner that two questions are presented by this petition for Certiorari. However, we think they are more accurately stated as follows:

ONE: Whether the priority accorded claims of the United States against the assets of an insolvent debtor by R. S. 3466 is defeated by a landlord's lien for rent arrears created by state law, where the landlord has, prior to appointment of receiver, caused to be issued and levied a distress upon the property of the insolvent.

TWO: Whether the lien accorded the United States for unpaid taxes by Section 3670 of the Internal Revenue Code is rendered subordinate to a landlord's lien recognized by state law and perfected by distress because notice of the tax lien was not filed until after the landlord's lien was perfected.

STATUTES INVOLVED

The pertinent provisions of the statutes of United States and of the State of South Carolina involved are printed in petitioner's appendix on Pages 13 to 16.

STATEMENT

The statement as found in petitioner's brief is adopted herein.

REASONS FOR REFUSING THE WRIT

ONE: There can be no question but that R. S. 3466 (31 USCA 191) gives debts due the United States by an insolvent priority over general creditors of the insolvent, and also, priority over lien creditors where the lien is not perfected or specific. This rule was fully recognized by the Master who first heard the case (R-5), the Circuit Judge to whom it was appealed (R-9-10-11) and the Supreme Court of South Carolina in its opinion by Mr. Justice Taylor (R-13).

However, it was held by all of these tribunals that in this case the landlord's lien was perfected and specific as of the time

of the appointment of the Receiver. (R-4, R-10, R-13).

The Government in no way excepted to that finding in either its appeal to the Circuit Court or to the Supreme Court of South Carolina (R-11). Based upon the Transcript of Record in that court, agreed to by both the Government and the landlord, it was believed that the specificity and perfection of the landlord's lien was not in issue; only the question of its priority, assuming, as was proper in the absence of an appeal thereabout, it was settled that the landlord's lien was perfected. The first intimation to the contrary was contained in the Government's printed argument in the Supreme Court of South Carolina, wherein the contention was made that the landlord's lien was not perfected and specific.

Questions not raised by the exception cannot be argued in or considered by the Supreme Court of South Carolina. *Nalley v. Metropolitan Life Ins. Co.*, 182 S. E. 301, 178 S. C. 183. We therefore respectfully submit that the question of whether or not the landlord's lien was specific and perfected as of the time of the appointment of the Receiver was not before the Supreme Court of South Carolina, and thus cannot properly be before this Court.

If, however, for the purpose of argument we concede that this question is properly before the Court, it is clear that here the landlord's lien was specific and perfected.

The procedure for distress in South Carolina is statutory and is quite different from common law distress. Unlike common law distress, the landlord does not issue the distress himself, but it is issued by a judicial officer, a Magistrate, upon the filing of an affidavit by the landlord of the amount of the unpaid rent. Section 41-151 of the *Code of Laws of South Carolina for* 1952.

Again, unlike common law distress the landlord is not allowed to go upon the demised premises and seize whatever chattels he finds subject to distraint. Instead, the judicial officer issuing the distress directs the sheriff or a constable to go upon the premises forthwith and demand the rent. Upon

failure to pay, this officer of the law distrains upon sufficient of the chattels thereon to satisfy the unpaid rent. The officer then gives the tenant a list of the property distrained together with a copy of the distress warrant. Section 41-153, *Code of Laws of South Carolina for* 1952.

All of this was done in the present case and the tenant was thereby divested of possession and title to the property distrained.

The Government argues the taxpayer was not divested of possession because the tenant has five days under the South Carolina statute to free his property from the lien of the distress by posting a bond in double the amount of the claimed rent. Section 41-160, *Code of Laws of South Carolina for* 1952. Petitioner has clearly confused a right to release from lien by substituting acceptable security for the property upon which the lien has attached, with the right to possession. These are two separate and distinct things and the right to substitute security for distressed property in no way impugns the perfection of the lien.

The Government argues the lien could not be specific because the distress was upon all of the assets of the taxpayer. This argument is based upon *United States v. Gilbert Associates,* 345 U. S. 361, 73 S. Ct. 701, where it was said:

> "In claims of this type, 'specificity' requires that the lien be attached to certain property by reducing it to possession . . ."

There can be no uncertainty in "all the assets" of the tenant, and it is hard to perceive how possession of those assets could be more effectively reduced to possession than by padlocking the premises.

The Government argues that the landlord could not have acquired possession since the Receiver, upon his appointment, took over all of taxpayer's assets, and the landlord's claim is being asserted against the proceeds of the Receiver's sale. This does not follow at all since the possession of the Receiver was with the consent of the landlord, who merely agreed to forego

the foreclosing of his perfected lien by sale as provided for in the statute, so that all priorities of liens could be determined in the receivership proceedings. The Order appointing the Receiver, of course, as is customary in such cases, enjoined any and all further legal proceedings against the insolvent except in the receivership proceeding and the landlord's action in not foreclosing his lien perfected by distress was perfectly natural, was in no way inconsistent with his perfected lien, and can give no comfort to petitioner.

TWO: We think it may safely be said that the Government's tax lien arising by virtue of Section 3670 was, prior to filing of notice, nothing more than a general, inchoate lien. *United States v. City of New Britain*, 374 U. S. 81, 74 S. Ct. 367. We also think it has been amply demonstrated that the landlord's lien was fully perfected and specific prior to the filing of such notice, and prior to the appointment of the Receiver.

This case is considerably different than *United States v. City of New Britain*, supra, where the Court had before it the question of the priority of two statutory tax liens; that of the United States and that of the City of New Britain. The Court, of course, held that the State of Connecticut could not by statute create a tax lien superior to the tax lien of the United States without the consent of the Congress. Here we have no South Carolina statute attempting to give a superior position to a state tax lien at the expense of the Federal Government. Instead, we have a landlord's lien recognized since the earliest days of the common law, and affected by the statutory law of South Carolina only in an effort to make its enforcement fairer and more equitable from a procedural standpoint.

Here we have a landlord who extends credit to his tenant. The tenant fails to pay the rent due for February. The landlord could immediately distress for this past due rent. A check of the public records would reveal no federal tax lien which would be paramount to his landlord's lien. Secure in the knowledge that his lien is a first lien against all the chattels of his tenant, he is tolerant of his tenant. He does not immed-

iately close him up and put him out of business. Instead, he extends him further credit for March and a portion of April. When finally it becomes evident the tenant will not or cannot pay the agreed upon rent, he converts his inchoate landlord's lien into a specific and perfected lien by distress. Why then is he not a "purchaser" within the meaning of the Section 3672 as the Master, the Circuit Judge and the Supreme Court of South Carolina held?

Petitioner advances no reason why not except the bald, unsupported statement that the landlord under the facts of this case does not come within any of the exceptions granted by Section 3672.

In *National Refining Co. v. United States*, 160 F. (2d) 951, the Court of Appeals for the 8th Circuit said:

> "We think it is safe to say that one who for a valuable present consideration, acquires property or an interest in property is a 'purchaser' within the meaning of 26 USCA Int. Rev. Code, 3672."

The landlord gave consideration by the use of the premises (especially after default in payment of the rent) and acquired an interest in the specific property by distress before the Government saw fit to give notice of its secret lien. Incidentally, it is appropriate to point out that the Government saw fit to keep its lien secret for some thirteen months. Certainly, in view of such dilatory action on the part of the Collector of Internal Revenue the Government is in no position to complain.

In *Hawkins v. Savage*, 110 F. Supp. 615, it was stated:

> "Section 3672 was enacted to protect what are commonly known as innocent purchasers for value, the word 'purchasers' embracing all those classes of persons who deal in the property of a debtor while other and secret liens against the property may exist."

Crawford Co. v. L. Leopold and Co., 70 N. Y. S. (2d) 183, affirmed 297 N. Y. 884, 79 N. E. (2d) 279; *Grossman v. City of New York*, 66 N. Y. S. (2d) 363, *United States v. Rosebush*,

45 F. Supp. 664 all seem to be authority for the landlord's position in this case.

The landlord has already been long delayed and put to great expense in order to secure that to which he is rightly entitled. Only $750.00 is involved. The decision below correctly and fairly decided the issues presented. It in no way conflicts with any prior decisions of this Court. That decision will in no way embarrass the Government in the collection of its revenues. It may compel the Director of Internal Revenue to be slightly more diligent in giving notice of the lien brought about because of unpaid federal taxes but that is no burden and no reason for this Court granting the petition for writ.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

THOMAS A. WOFFORD,

J. D. TODD, JR.,

Counsel for Respondents.

No. 85

In The Supreme Court of the United States

OCTOBER TERM, 1954

UNITED STATES OF AMERICA, *Petitioner*

Versus

R. P. SCOVIL, *ET AL.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

QUESTIONS

I

Whether the priority accorded claims of the United States for taxes against the assets of an insolvent debtor by R. S. 3466 is defeated by a landlord's lien for rent arrears perfected by distress prior to the appointment of the receiver?

II

Whether the lien accorded the United States for unpaid taxes by Section 3670 of the Internal Revenue Code is rendered subordinate to a landlord's lien recognized by state law and perfected by distress because notice of the tax lien was not filed until after the landlord's lien was perfected.

ARGUMENT

I

IS THE PRIORITY ACCORDED CLAIMS OF THE UNITED STATES FOR TAXES AGAINST THE ASSETS OF AN INSOLVENT DEBTOR BY R. S. 3466 DEFEATED BY A LANDLORD'S LIEN FOR RENT ARREARS PERFECTED BY DISTRESS PRIOR TO THE APPOINTMENT OF THE RECEIVER?

The statement of Question One as set forth in the Government's Brief assumes that the Landlord had not divested the debtor of possession of any property subject to the Landlord's lien. Respondent respectfully submits that this assumption is not justified by the record, but that, on the contrary, the record justifies the position that the insolvent debtor had been divested of possession of the property in question when the Receiver was appointed.

The Master, who first heard the case and before whom the Stipulation was made, found that "his landlord's lien as provided by statute, was fully perfected." (R-4) The Master, who incidentally has held that judicial position for the past thirty-four years, had before him at the time of his decision *United States v. Waddil Co.*, 323 U.S. 353, 65 S.Ct. 304, (R-4) which case, as the Government so strongly points out, sets forth the requirements for a specific and perfected lien. It is beyond the realm of reason to suppose that this experienced judge, familiar with the very case relied upon by the Government, would hold the Landlord's lien to be specific and perfected had the Landlord not, prior to the appointment of the Receiver, divested the debtor of possession.

The Circuit Judge likewise found the lien of the Landlord to be specific and perfected. (R-10)

The Government did not except to this concurrent finding by the Master and the Circuit Judge upon its appeal to the Supreme Court of South Carolina. (R-11) The question of the specificity and perfection of the Landlord's lien was not in issue before that Court, having not been raised by the Excep-

tions. *Nally v. Metropolitan Life Insurance Company*, 182 S. E. 301, 178 S. C. 183. The Supreme Court of South Carolina was then quite correct in holding, as it did hold in the opinion below,

> "There is no question in this case of distress having been perfected prior to the appointment of the receiver; therefore the lien was perfected as of that time and the amount specified in such distress was not available to the receiver to pay other debts of the insolvent debtor." (R-13)

The question before this Court then resolves itself into whether the Government's tax lien can be defeated by a prior specific and perfected lien. The Government evidently recognizes that this is the real question before the Court for it argues at length that "this Court has never actually held there is an exception to the absolute priority accorded the United States by the statute." (Page 23, Petitioner's Brief)

Such statement is quite true but this Court has certainly intimated since *Thelusson v. Smith*, 2 Wheat. 396, that if the lien were specific and certain, as we submit it is here, that the Government's priority was subordinated.

The Government states at Page 21 of its Brief:

> "The taxpayer's rights in the property after appointment of the receiver were nil - unless, of course, a surplus should remain after payment of creditors."

Likewise, the taxpayer's rights in the property were nil after the levy of the distress unless a surplus remained after the sale. The taxpayer having no rights in the property at the time of the appointment of the Receiver, the Government could have no rights either.

The learned Attorney General states at Page 21 of the Government's Brief:

> "The United States does not stand in the shoes of the insolvent, and is not claiming under any right of subrogation. It is claiming as a creditor, just as the landlord is, but under a priority granted by Congress, and this Court has never held that Congress, acting

under the powers granted to it by the Constitution, cannot place the debts of the United States ahead of all other debts owing by an insolvent debtor."

This may be true but the Congress, under the Constitution, has not and cannot give the United States a lien against property in the hands of third persons for the tax debt of another. Once the distress was perfected the only claim the United States might have against the property distressed upon would be because of some right the taxpayer might have. He having none, the Government has none.

II

IS THE LIEN ACCORDED THE UNITED STATES FOR UNPAID TAXES BY SECTION 3670 OF THE INTERNAL REVENUE CODE RENDERED SUBORDINATE TO A LANDLORD'S LIEN RECOGNIZED BY STATE LAW AND PERFECTED BY DISTRESS BECAUSE NOTICE OF THE TAX LIEN WAS NOT FILED UNTIL AFTER THE LANDLORD'S LIEN WAS PERFECTED?

We think it may safely be said that the Government's tax lien arising by virtue of Section 3670 was, prior to filing of notice, nothing more than a general, inchoate lien. *United States v. City of New Britain*, 374 U.S. 81, 74 S.Ct. 367. We also think it has been amply demonstrated that the landlord's lien was fully perfected and specific prior to the filing of such notice, and prior to the appointment of the Receiver.

This case is considerably different than *United States v. City of New Britain*, supra, where the Court had before it the question of the priority of two statutory tax liens; that of the United States and that of the City of New Britain. The Court, of course, held that the State of Connecticut could not by statute create a tax lien superior to the tax lien of the United States without the consent of the Congress and that where both liens are general statutory liens, the first in time is the first in right. Here we have no South Carolina statute attempting to give a superior position to a state tax lien at the expense of the Federal Government. Instead, we have a Landlord's lien

recognized since the earliest days of the common law, and affected by the statutory law of South Carolina only in an effort to make its enforcement fairer and more equitable from a procedural standpoint.

Here we have a Landlord who extends credit to his tenant. The tenant fails to pay the rent due for February. The Landlord could immediately distress for this past due rent. A check of the public records would reveal no Federal tax lien which would be paramount to his Landlord's lien. Secure in the knowledge that his lien is a first lien against all the chattels of his tenant, he is tolerant of his tenant. He does not immediately close him up and put him out of business. Instead, he extends him further credit for March and a portion of April. When finally it becomes evident the tenant will not or cannot pay the agreed upon rent, he converts his inchoate Landlord's lien into a specific and perfected lien by distress. Why then is he not a "purchaser" within the meaning of the Section 3672 as the Master, the Circuit Judge and the Supreme Court of South Carolina held?

In *National Refining Co. v. United States*, 160 F. (2d) 951, the Court of Appeals for the 8th Circuit said:

> "We think it is safe to say that one who for a valuable present consideration, acquires property or an interest in property is a 'purchaser' within the meaning of 26 USCA Int. Rev. Code, 3672."

The Landlord gave consideration by the use of the premises (especially after default in payment of the rent) and acquired an interest in the specific property by distress before the Government saw fit to give notice of its secret lien. Incidentally, it is appropriate to point out that the Government saw fit to keep its lien secret for some thirteen months. Certainly, in view of such dilatory action on the part of the Collector of Internal Revenue the Government is in no position to complain.

In *Hawkins v. Savage*, 110 F. Suppl. 615, it was stated:

> "Section 3672 was enacted to protect what are

> commonly known as innocent purchasers for value, the word 'purchasers' embracing all those classes of persons who deal in the property of a debtor while other and secret liens against the property may exist."

Crawford Co. v. L. Leopold and Co., 70 N.Y.S. (2d) 183, affirmed 297 N.Y. 884, 79 N.E. (2d) 279; *Grossman v. City of New York*, 66 N.Y.S. (2d) 363, *United States v. Rosebush*, 45 F. Suppl. 664, all seem to be authority for the Landlord's position in this case.

The Landlord was a "purchaser" within the meaning of Section 3672 at the time the Government gave notice of its tax liens by filing. On some of these claims the assessment lists had been received in the Collector's Office more than a year prior to the levy of the distress by the Landlord. Even the slightest diligence on the part of the Government would have given notice to the Landlord that he could not depend upon the property of the tenant on the premises for satisfaction of any unpaid rent. He could have protected himself by prompt action upon the first default in the payment of the rent. Lulled into a false sense of security, he extended credit on the faith of ample property available for the satisfaction of his debt. Equity, good conscience and the terms of the statute require that he be protected as a "purchaser".

CONCLUSION

There is no error in the decision of the Court below and it should be affirmed.

Respectfully submitted,
J. D. Todd, Jr.,
Attorney for Respondent